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03-1690

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 03-1690-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYRONE L. DUBOSE,

Defendant-Appellant-Petitioner.

ON PETITION TO REVIEW A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN BROWN COUNTY CIRCUIT COURT, JUDGE SUE E. BISCHEL, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

SHOULD THERE BE NEW STANDARDS FOR THE ADMISSION OF EVIDENCE CONCERNING OUT-OF-COURT EYEWITNESS IDENTIFICATION PROCEDURES INVOLVING ONE PERSON SHOWUPS?

The circuit court and the court of appeals did not explicitly address this question. They applied the current standards governing challenges to showups and other

eyewitness identification evidence. Under the existing standards for the admission of evidence of showups, both the circuit court and the court of appeals concluded that the evidence was admissible.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are warranted because this case addresses the need for new standards governing the use of evidence derived from showups.

STATEMENT OF THE CASE AND OF THE FACTS

On January 9, 2002, at bar closing time, Timothy Hiltsley was leaving the Camelot Bar in Green Bay with a friend named Ryan Boyd (62:5; 65:12, 14, 29-30, 71:80, 92). He "had a buzz on" because he had been drinking (62:6-7; 65:23-24; 71:95).

After leaving the bar and going outside, Hiltsley met a group of other people, some of whom he thought he recognized from one of the liquor stores he worked at (62:5, 6; 65:21, 29; 71:81). After a short discussion about smoking marijuana and, possibly, after having another drink, Hiltsley, his friend and two African American men from the group of people decided to go to Hiltsley's home to smoke marijuana (62:6; 65:24, 29-30; 71:81). The four men were together outside the bar for only "a few minutes" (65:17; 71:93).

The four men got into Hiltsley's car and Hiltsley drove them to his apartment (65:17; 71:82). After being in the apartment for "not very long at all," perhaps five minutes (62:4; 65:13, 18), as Hiltsley was talking to one of the two African American men and about to smoke some marijuana, the other man came up to Hiltsley, pointed a gun at his head and demanded that he empty his wallet (62:8; 65:13; 71:84). After Hiltsley complied the

two African American men ran from the apartment (62:12-13; 65:13; 71:85-86). The whole incident happened so fast that Hiltsley did not realize what was happening (62:13).

Hiltsley and Boyd ran out of the apartment to give chase (65:14; 71:87). They saw the two men head south into a yard on his side of the street (65:16; 71:92, 105, 110). They got into Hiltsley's car and drove east down Division Street in an attempt to cut off the two men, and after a few blocks, near Division Street and Norwood Avenue, Hiltsley got out of the car while his friend continued to drive around looking for the men (65:14-15; 71:87-88).

Hiltsley headed south down Norwood Avenue toward Dousman Street, the street one block south of Division (33:Exhibits 1 and 2; 71:88, 92). While he was walking he met up with a police officer. Hiltsley told the police he had been robbed at gun point by two African American men, one about five foot, six inches tall, the second a bit taller (65:15, 22; 97:115). He did not give the police any further description of the men, and told one officer that he did not remember much else because he had been drinking (65:51; 71:116).

The police were in the area because they had received a call of a possible burglary from a neighbor who lived across Division Street from Hiltsley (65:35; 71:71, 122). The neighbor had seen two men running eastbound on Division Street and had then seen a car take off at high speed in the same direction (65:35; 71:72-74). Officer Jeffrey Engelbrecht responded to the burglary call, arriving at Division Street and Norwood Avenue a minute or so after the dispatch based on the neighbor's call (65:35; 71:122). Officer Engelbrecht testified that the dispatch had referred only to two people, one wearing a large flannel shirt with a hood, and that they had possibly gotten into a car going eastbound on Division Street (65:35; 71:123-24).

As Officer Engelbrecht headed north on Norwood Avenue, he saw two people walking eastbound on Division Street, away from Hiltsley's residence (65:36; 71:125). They were about half a block from Hiltsley's apartment (65:36). The two people ran north up Norwood and between houses to the east (33:Exhibits 1 and 2; 65:37-38).

After he saw the two people run between the houses, the officer called for additional officers to set up a perimeter around the block into which he saw them run (65:38; 71:128). He also called a canine unit (65:38; 71:129). While waiting for the dog unit to arrive, Officer Engelbrecht received a dispatch concerning an armed robbery (65:38; 71:130). Dispatch also advised that the burglary and armed robbery calls might be related (*id.*). The dispatch said only that the suspects were two African American men, and apparently gave no description of clothing (65:39, 43-44; 71:130). Officer Engelbrecht did not see whether the two people who ran were either African American or male (65:45; 71:129).

Once the dog and its handler arrived, the handler had the dog find a track (71:130). Officer Engelbrecht and the handler followed the dog through the back yards of the houses on the block (65:39; 71:131). When the dog got to a fence in one of the back yards, it stopped and began barking and holding in front of the fence (65:40; 71:131-32). The officer handling the dog ordered the person behind the fence to come out (*id.*). The person did so and was arrested (*id.*). Police later returned to the area where Dubose was arrested and, after a search, found a handgun (65:41-42; 71:135). No fingerprints were found on the gun, and no money was recovered (65:45; 71:153).

After identifying the person as Tyrone Dubose, Officer Engelbrecht searched him and placed him in the back of a squad car (65:40-41). While the officer thought that one of the two people he had seen running had a flannel shirt on, Dubose was not wearing one (65:44-45;

71:142). Further, because he had been unable to see much of the people who were running, Officer Engelbrecht could not say whether Dubose was one of the people he saw running (71:143).

After Dubose was placed in the police car, another officer drove Hiltsley over to where Dubose was being held (65:42, 49; 71:89). When the two cars pulled side by side, Hiltsley looked at Dubose through the car window (65:18, 26-27, 50). This showup happened approximately 10 to 15 minutes after the robbery (65:18; 71:89). Hiltsley said he was "98% sure" that Dubose was the man who had robbed him (65:32; 71:98). He claimed he recognized Dubose's hair style and the shirt he was wearing (65:28; 71:97).

Both Dubose and Hiltsley were taken to the police station, where, about 10 to 15 minutes after the first showup, Hiltsley viewed Dubose again, this time while Dubose was in a room containing a two-way mirror (65:19, 28; 71:97-98). It was the same man who was in the back of the squad car, and Hiltsley again said he believed Dubose was the man who had robbed him (65:20). Shortly after the second showup the police showed him a mug shot of Dubose (65:20-21).

Dubose was charged with one count of armed robbery (2; 5). He filed a motion to suppress the identification evidence (10), alleging that the showups of Dubose in the police car and at the police station were impermissibly suggestive.[1] The circuit court denied the motion, holding that the showups were not impermissibly suggestive (67:8-13; App. 115-20).

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[1] Dubose also challenged the identifications based on the argument that he was arrested without probable cause (65:10). The circuit court (67:8; App. 115) and court of appeals (slip op. ¶¶ 26; App. 110) both rejected this argument. Dubose does not pursue it in this court.

At a jury trial Hiltsley identified Dubose in court (71:82). He also testified that he identified Dubose at the showups held after Dubose's arrest (71:89, 97-98). The jury found Dubose guilty (36; 72:336).

Dubose appealed from the judgment of conviction (54). The court of appeals affirmed in an unpublished opinion (App. 101-14). Following the current case law on whether an identification procedure is impermissibly suggestive and unreliable, the court of appeals held that the showups of Dubose were not impermissibly suggestive and therefore rejected his argument that evidence of the showups should not have been admitted at trial (slip op. ¶¶ 29-37; App. 111-14).

This court accepted Dubose's petition for review on the issue of standards for the admission of eyewitness identification evidence.

ARGUMENT

THIS COURT SHOULD DECLARE THAT IDENTIFICATION TESTIMONY CONCERNING AND BASED ON A SHOWUP IS *PER SE* INADMISSIBLE UNLESS THE STATE PROVES THAT THE SHOWUP WAS NECESSARY AND THAT THE IDENTIFICATION BASED ON THE SHOWUP IS RELIABLE.

A. The problem with eyewitness identification evidence.

This case deals with three showups—out-of-court pretrial identification procedures in which a suspect is presented singly to a witness for identification purposes. The police showed Tyrone Dubose alone, either in person or using a photograph of him, to the victim of the robbery, Timothy Hiltsley.

The courts have long recognized that eyewitness evidence is unreliable. In its first significant foray into the issue, the U.S. Supreme Court famously said:

> The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. . . . A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.

United States v. Wade, 388 U.S. 218, 228 (1967).

To prevent the injustice that occurs because of mistaken eyewitness identification evidence, the Supreme Court held in ***Stovall v. Denno***, 388 U.S. 293 (1967), that a criminal defendant has a due process right to exclude evidence derived from improper pretrial identification

procedures. However, in a series of cases following ***Stovall*** and culminating in ***Manson v. Brathwaite***, 432 U.S. 98 (1977), the Supreme Court weakened the right to due process and developed a two-prong test. First, a court must decide whether the identification procedure was unduly suggestive. If it was not, evidence concerning the procedure is admissible at trial. If it was, the court must then consider whether the evidence should be admitted anyway because it is reliable as judged by a five-factor test that looks at such factors as the witness's confidence in the identification and the witness's degree of attention. Under this approach, the "linchpin" of the admissibility question is whether the eyewitness evidence is reliable. ***Manson***, 432 U.S. at 114. This two-prong test has been adopted in Wisconsin. ***State v. Powell***, 86 Wis. 2d 51, 63-66, 271 N.W.2d 610 (1978); ***State v. Wolverton***, 193 Wis. 2d 234, 264, 533 N.W.2d 167 (1995).

The problems with mistaken eyewitness identification evidence have recently become a focus of attention. This has happened because of a series of cases in which DNA evidence has exonerated innocent convicts. *See, e.g.*, U.S. Dep't of Justice, ***Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*** (1996).[2] These exonerations showed that "eyewitness misidentification was the single leading cause of wrongful conviction in the United States." *See* Winn S. Collins, ***Improving Eyewitness Evidence Collection Procedures in Wisconsin***, 2003 Wis. L. Rev. 529, 530; Donald P. Judges, ***Two Cheers for the Department of Justice's "Eyewitness Evidence: A Guide for Law Enforcement"***, 53 Ark. L. Rev. 231, 234 (2000).

The DNA exonerations certainly make it clear that "[c]riminal justice officials did not realize the full extent of the problem" with eyewitness identification evidence. Collins, ***Improving Eyewitness Evidence Collection***,

[2] Available at http://www.ncjrs.org/pdffiles/dnaevid.pdf.

2003 Wis. L. Rev. at 529-30. More importantly, the recent exonerations demonstrate that the two-prong test devised thirty years ago has failed to do what it is supposed to do: keep unreliable eyewitness evidence from being admitted at trial.

The following argument first discusses why the current test fails on both legal and scientific grounds (Part B). The argument then proposes a new standard for the admission of showups that will both better serve the legal interests at stake in these cases and be consistent with what we know about human memory and eyewitness identification (Part C). Specifically, it proposes that this court should hold that showups are *per se* suggestive and thus inadmissible unless the state proves by clear and convincing evidence that the showup was necessary. In addition, if the showup was deemed to be necessary, evidence of the showup should be admissible only if the state proves the identification is reliable, as determined with a focus on factors that better incorporate our understanding of human memory and thus have real relevance to determining reliability.

B. The current two-prong test for the admissibility of eyewitness identification evidence does not screen out unreliable evidence.

A brief history of the development of the due process test shows how it changed from focusing on the propriety of the procedures used to collect evidence to focusing on the reliability of the outcome of the procedures. This change in focus gives too little weight to the due process interests at stake and has resulted in the practical failure of the test.

Further, scientific investigation conducted largely since the 1970s shows that instead of ensuring reliability, the current two-prong test actually exacerbates the likelihood that unreliable evidence resulting from a

suggestive procedure will be admitted. Thus, both the defendant's due process rights and the science support the argument that the current test must be changed.

1. The history of the right to due process during pretrial identification procedures shows too little concern for the due process value of fairness.

When it was first enunciated, the right to due process protected the criminal defendant's rights to fair pretrial procedures. "Over time, however, the Supreme Court began to focus less on the fairness of the pretrial procedures and more on the reliability of the outcomes of those procedures." Benjamin E. Rosenberg, ***Rethinking the Right to Due Process in Connection With Pretrial Identification Procedures: An Analysis and a Proposal***, 79 Ky. L. J. 259, 261-62 (1991). Thus, "[r]ather than asking whether pretrial identification procedures were fair, the Court instead asked whether the evidence produced was reliable. As long as the Court determined that the evidence was reliable, there was no due process violation." ***Id.*** at 262.

Stovall v. Denno, 388 U.S. 293 (1967), was the first case in which the Supreme Court considered whether, and under what circumstances, pretrial procedures might raise due process issues. In ***Stovall*** the defendant, who was suspected of murder, was exhibited on the day after the crime, alone and handcuffed to a police officer, before the only living eyewitness of the crime. ***Id.*** at 295. The eyewitness had been stabbed multiple times and was in the hospital for surgery, so the confrontation was held in the eyewitness's hospital room. ***Id.*** The eyewitness identified the defendant, and that pretrial identification, as well as an in-court identification by the same witness, was admitted into evidence at the trial. ***Id.***

The Court considered whether the pretrial identification "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law." ***Id.*** at 302.[3] The Court observed that denial of due process "is a recognized ground of attack upon a conviction" and observed that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." ***Id.*** Nevertheless, the Court held that the existence of a due process violation "depends on the totality of the circumstances" of the case. ***Id.***

The Court found no due process violation in ***Stovall***. Although the showup in the witness's hospital room had been suggestive, it was "imperative" because the eyewitness was the only person in the world who could possibly exonerate the defendant and no one knew how long the eyewitness would live because of the injuries suffered during the crime. ***Id.*** at 302. The Court did not go on to consider whether the eyewitness's pretrial or in-court identifications were reliable or to what degree they had been improperly influenced by the showup.

Stovall marked a sea-change, for as the Court itself observed, "[t]he overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury." 388 U.S. at 299-300. *Cf.* ***State v. Clarke***, 36 Wis. 2d 263, 274, 153 N.W.2d 61 (1967) (propriety of pre-***Stovall*** lineup presents only an evidentiary question). Because of the novelty of the holding, the ramifications of ***Stovall***

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[3] The main issue in ***Stovall*** was whether the defendant's right to counsel at certain pretrial identification procedures had been violated. That right was announced on the same day as the ***Stovall*** decision, in ***United States v. Wade***, 388 U.S. 218 (1967), and ***Gilbert v. California***, 388 U.S. 263 (1967). The Court held that the right to counsel would not be applied retroactively.

were not clear. Rosenberg, ***Rethinking the Right to Due Process***, 79 Ky. L. J. at 265.

In particular, ***Stovall*** was not clear about the rationale for the due process right it enunciated. It might be simply that the admission of unreliable evidence violated due process, in which case the right would be protecting the defendant's interest in being convicted on reliable evidence. However, the distinction between *necessarily* and *unnecessarily* suggestive procedures suggested that the interest at stake was the fairness of the identification procedures, for if the reliability of the evidence were the only interest at stake it would not matter whether a pretrial procedure was necessarily or unnecessarily suggestive, only that it was reliable despite the suggestiveness. ***Id.***

Two years later, the Court applied the due process analysis to invalidate the pretrial identification procedures in ***Foster v. California***, 394 U.S. 440 (1969). In ***Foster,*** the defendant had been exhibited in two lineups. The first lineup included only three people; the defendant was taller than the other two and the only one wearing a leather jacket, like the assailant. ***Id.*** at 441. The witness could not positively identify the defendant, although the witness "thought" that the defendant was the assailant. ***Id.*** After the lineup, the witness saw the defendant alone, face-to-face, but was still unsure whether the defendant was the assailant. ***Id.*** The defendant was later put in a second lineup; he was the only person who was in both lineups. ***Id.*** at 441-42. At the second lineup, the witness was certain that the defendant was the assailant. ***Id.*** at 442. The witness testified to both of these identifications and made an in-court identification of the defendant. ***Id.***

Relying on ***Stovall,*** the Court held that the defendant's right to due process had been violated because "the pretrial confrontations clearly were so arranged as to make the resulting identifications virtually inevitable." ***Id.*** at 443. Like ***Stovall***, the Court's language

suggests that the defendant had a due process interest in not having the state use unfair procedures, that is, procedures that made a positive identification "virtually inevitable." Further, ***Foster*** pointed out that while the reliability of properly admitted eyewitness identification is, like credibility generally, a matter for the jury, nonetheless:

> [I]t is the teaching of ***Wade***, ***Gilbert***, and ***Stovall*** that in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law.

Foster, 394 U.S. at 442 n.2.

The cases had not identified which procedures were "so defective" that they were unconstitutional and which ones were, although defective, not bad enough to keep the evidence from the jury. *See* Rosenberg, ***Rethinking the Right to Due Process***, 79 Ky. L. J. at 269. But they are premised on the fact that some procedures were so unfair to the defendant that evidence of the procedures should not be admissible. At the same time, other cases after ***Stovall*** showed the Court could—and ultimately would—take another direction.

Even before deciding ***Foster*** the Court began a retreat from ***Stovall***'s implicit focus on the identification procedure itself. In ***Simmons v. United States***, 390 U.S. 377 (1968), the Court upheld a robbery conviction based on in-court identifications even though the witnesses had been shown photographs of the defendant before trial in a process that "may have in some respects fallen short of the ideal" and therefore may have tainted the in-court identifications. ***Id.*** at 382, 385-86. ***Simmons*** stated that the standard was whether the procedure was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***Id.*** at 384. In finding that the in-court identification was not irreparably tainted by the pretrial identification

procedure, the Court relied on the circumstances surrounding the robbery and the details of the suggestive photo display. ***Id.*** at 384-86.

In ***Stovall,*** the suggestive showup had been held to be necessary because the eyewitness was the only one to the crime and appeared to be in imminent danger of dying. No similarly compelling circumstances existed in ***Simmons,*** yet the Court was satisfied that the photo identification procedure, although suggestive, was necessary because the crime was a serious felony, the perpetrators were still at large and the need for the police to "properly deploy their forces." ***Id.*** at 384-85. These factors are far broader than the circumstances in ***Stovall*** and would apply in a vast number of felony cases, which would in turn make many suggestive pretrial procedures "necessary."

Further, by finding that the photo identification procedure was necessary but then going on to consider the reliability of the evidence, ***Simmons*** undermined the distinction made in ***Stovall*** between necessarily suggestive and unnecessarily suggestive procedures. The concern with reliability suggested that whether the suggestive procedure was "necessary" was not constitutionally significant; what mattered was reliability.

The cases immediately following ***Stovall*** show that the analysis of the right to due process in identification procedures was "confused." Rosenberg, ***Rethinking the Right to Due Process***, 79 Ky. L. J. at 272. The confusion sprang from a question ***Stovall*** did not answer: "whether the purpose of the right was to guarantee the reliability of eyewitness identifications or to protect against abusive procedures. Did the right focus on the outcomes of procedures or on the procedures themselves?" ***Id.*** The Court's next two cases definitively established that the right to due process focused solely on the reliability of the outcome, *not* on procedural fairness.

The first case was ***Neil v. Biggers***, 409 U.S. 188 (1972), where the issue was whether a showup identification procedure in the police station was so suggestive that the admission into evidence of the resulting identification violated the defendant's right to due process. ***Biggers*** held that the right to due process would focus solely on the outcome of the procedures—the reliability of the evidence—not on their fairness. The Court held that "[i]t is the likelihood of misidentification which violates a defendant's right to due process." ***Id.*** at 198. Thus, "[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification. . . ." ***Id.*** at 198.

Having established that the right focused on reliability of outcome, it followed that there was no basis to distinguish between *necessarily* suggestive procedures and *unnecessarily* suggestive ones because the necessity of the suggestiveness is irrelevant to the reliability of the identification. It also followed that due process did not require that every pretrial identification that was the product of an unnecessarily suggestive pretrial identification procedure be excluded from evidence. ***Id.*** at 199.

Instead, the Court held that due process required the exclusion of pretrial identifications only if 1) the pretrial identification procedure was suggestive (without regard for necessity) and 2) the identification was unreliable. ***Id.*** at 199. The Court indicated that whether a pretrial identification was reliable depended upon a "totality of the circumstances" test, and identified five factors to be considered in applying that test:

> [T]he factors to be considered in evaluating the likelihood of misidentification include [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation,

> and [5] the length of time between the crime and the confrontation.

Id. Using those factors, the Court held that although the showup in that case had been suggestive, the witness's pretrial identification was reliable and thus could be admitted into evidence without violating due process. ***Id.*** at 200-01.

In ***Manson v. Brathwaite***, 432 U.S. 98 (1977), the Court reaffirmed the focus on the reliability of the identification as the sole determinant of admissibility. ***Id.*** at 112. The Court also reaffirmed that the two-step test enunciated in ***Biggers*** was applicable to all pretrial identifications because it best achieved the goal of the due process analysis of pretrial identification procedures—namely, promoting reliable eyewitness identifications. ***Id.*** at 113-14. As the Court declared, "reliability is the linchpin in determining the admissibility of identification testimony" and the factors to be considered in determining reliability are those set out in ***Biggers***. ***Manson***, 432 U.S. at 114.

As one commentator has concluded:

> ***Manson*** demonstrated that the Court did not believe that reliability was a value of great constitutional significance. The Court stated that the right to due process in connection with pretrial identification procedures "protect[ed] an evidentiary interest" and noted "the limited extent of that interest in our adversary system."

Rosenberg, ***Rethinking the Right to Due Process***, 79 Ky. L. J. at 274, *quoting* ***Manson***, 432 U.S. at 113. Reliability is not an important constitutional value itself because "[c]ounsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification including reference to any suggestibility in the identification procedure and any countervailing testimony such as an alibi." ***Manson***, 432 U.S. at 113

n.14. In short, even though the evidence may be untrustworthy because of the way in which it was collected, if it was reliable enough under the second prong of the test then it was up to the jury to decide whether or not to believe it. ***Id.*** at 116. As already noted, Wisconsin has adopted the test articulated in ***Biggers*** and ***Manson***. *See* ***Powell***, 86 Wis. 2d at 63-66.

In changing the focus of the issue from the fairness of the identification procedures to the reliability of the resulting identification, the courts have devalued an important interest that the Constitution must protect—namely, procedural fairness—and elevated reliability of the product of whatever procedure used, as tested by enumerated factors. The rationale for this change was that it would deter police use of suggestive procedures and better serve the administration of justice while still providing a deterrent against use of procedures that created unreliable evidence. ***Manson***, 432 U.S. at 112-13.

But as the recent DNA exonerations show, in practice these goals are not being achieved. Devaluing fair identification procedures has only resulted in continued use by law enforcement of highly suggestive procedures like those in this case—three serial showups, a procedure widely condemned in 1967. *Cf.* Collins, ***Improving Eyewitness Evidence Collection***, 2003 Wis. L. Rev. at 551-52 (noting few Wisconsin cases have suppressed evidence based on suggestive procedures and listing cases where evidence was admitted despite highly suggestive procedures). The continued use of suggestive procedures in turn has created a situation in which mistaken eyewitness identification evidence is the single largest cause of wrongful convictions. ***Id.*** at 530. The administration of justice is hardly served by incarcerating innocent persons, whose cases must be reopened and reinvestigated years after the fact.

Moreover, the science developed since ***Manson*** shows that the test's focus on reliability will not keep out

unreliable eyewitness evidence. The argument now turns to a review of that science.

2. The scientific research shows that the current two-prong test can not ensure reliable eyewitness identification evidence.

The research on human perception since the 1970s provides two compelling reasons why the current test's reliance on reliability is misplaced. First, the factors used to test reliability are not necessarily related to reliability. Second, suggestive procedures, coupled with the factors the courts rely on to judge reliability, create a high probability that unreliable eyewitness identification evidence will be admitted.

Before reviewing the scientific studies bearing on the reliability of eyewitness identification evidence, it is worth noting an analogy about eyewitness identification evidence that will make clearer the importance of proper procedures for collecting it. The analogy is this: A witness's memory of an event is a kind of "trace evidence." Gary L. Wells, ***Scientific Study of Witness Memory: Implications for Public and Legal Policy***, 1 Psychol. Pub. Pol. & L. 726 (1995). Thus,

> [J]ust as a fingerprint is a physical impression left by the perpetrator on a touched surface, eyewitness evidence consists of a neurological impression encoded and stored in the brain of the witness.

Judges, ***Two Cheers***, 53 Ark. L. Rev. at 240 (footnotes omitted).

The criminal justice system requires that procedures for preserving, collecting, storing, and analyzing physical evidence be based on principles developed through science and insists on proper training in the procedures for law enforcement first responders, investigators, and technicians. ***Id.*** By contrast, eyewitness

evidence "often is handled through procedures based on intuition and tradition rather than science." ***Id.*** at 241. The reasons for this difference are evident:

> For many forms of trace evidence, the science came first and had to satisfy legal standards for admissibility before finding evidentiary acceptance in the criminal justice system. Memory traces reported by eyewitnesses, however, are perhaps the oldest form of evidence, the acceptance of which long antedated any scientific study of its properties. And memory, unlike DNA identification or forensic pathology, is of course something with which everyone has direct, everyday personal experience.

Id.

The research into eyewitness identification evidence supports some of our common assumptions about such evidence but debunks others. It also has suggested ways to improve the collection of the evidence by identifying relevant issues that may not occur at all to the lay observer. *See, e.g.*, Gary L. Wells *et al.*, ***Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads***, 22 L. & Hum. Behav. 603 (1998). On the basis of this research, a technical working group at the U.S. Department of Justice developed guidelines for law enforcement to improve collection of eyewitness evidence. U.S. Dep't of Justice, ***Eyewitness Evidence: A Guide for Law Enforcement*** 1-2 (1999).[4]

With the burgeoning literature on eyewitness identification evidence, it is now possible for the courts to insist on proper techniques for the collection, analysis and introduction of eyewitness identification evidence so that the maximum amount of evidence may be recovered while minimizing contamination. Indeed, it is imperative that this be done given the infirmity of the current test.

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[4] Available at www.ncjrs.org/pdffiles1/nij/178240.pdf.

a. Suggestive procedures will contaminate identification evidence.

Research into memory of an event shows that the basic process for creation of the memory involves three stages: acquisition, retention and retrieval. Elizabeth A. Loftus, ***Eyewitness Testimony*** 21 (1996 ed.). Suggestiveness, and therefore contamination, may take place at the retention or retrieval stage of this process, when the witness might be provided with other stimuli or information that affect which details to focus on or recall. ***Id.*** at 21-22, 54-55, 108-09. The problem the criminal justice system must be concerned with is contamination at the retention or retrieval stage, when the police seek or provide—via a lineup or showup—information about the offender. Judges, ***Two Cheers***, 53 Ark. L. Rev. at 244-45. *See also* ***State v. Long***, 721 P.2d 483, 488-91 (Utah 1986).

Eyewitness identification researchers make a distinction between two kinds of variables that affect the stages of memory creation. The first is an "estimator" variable, which are those lying outside the control of the investigator, including characteristics of the witness (age, race) and characteristics of the event (length, lighting conditions, the presence of a weapon). Gary J. Wells and Elizabeth A. Olson, ***Eyewitness Testimony***, 54 Ann. Rev. Psychol. 277, 280-81 (2003). "System" variables are those within the control of the investigator and therefore subject to control and manipulation, intentional or otherwise. ***Id.*** at 285. These include procedures used for interviewing witnesses, creating and conducting a lineup and instructing the witnesses viewing the lineup. Judges, ***Two Cheers***, 53 Ark. L. Rev. at 242-44.

The difference between the two variables matters for the following reason:

> Whereas estimator variables can at best increase the probability that the criminal justice system can sort

> accurate from inaccurate eyewitness identifications, system variable can help prevent inaccurate identifications in the first place.

Wells and Olson, ***Eyewitness Testimony***, 54 Ann. Rev. Psychol. at 285.

The scientific research shows how system variables can adversely affect eyewitness identification accuracy. For purposes of this case, it is most important to consider the suggestiveness of a one-person showup. Research has confirmed that a one-person showup does indeed greatly inflate the chances that an innocent suspect will be identified compared to the chances in a well-run lineup. *See* Wells *et al.*, ***Eyewitness Identification Procedures***, 22 L. & Hum. Behav. at 631; Gary L. Wells, ***Police Lineups: Data, Theory, and Policy***, 7 Psychol. Pub. Pol. & L. 791, 795 (2001); A. Daniel Yarmey *et al.*, ***Accuracy of Eyewitness Identifications in Showups and Lineups***, 20 L. & Hum. Behav. 459, 460, 473 (1996).

The reasons for the suggestiveness of showups include those cited by courts. By showing one person to a witness, the police are implicitly telling the witness that they believe the suspect is the offender. Brian L. Cutler and Steven D. Penrod, ***Mistaken Identification: The Eyewitness, Psychology and the Law*** 113-14 (1995). The courts recognize this phenomenon. *See, e.g.*, ***State v. Isham***, 70 Wis. 2d 718, 725-26, 235 N.W.2d 506 (1975). But they do not properly acknowledge the power of this suggestion on the witness. If the witness trusts legal authority and believes police procedures are usually fair, he or she may feel pressure to validate the police officers' judgment. Yarmey *et al.*, ***Accuracy of Showups***, 20 L. & Hum. Behav. at 459. Further, because identification of the suspect is obvious—that is, there are no fillers who might be the suspect—it is difficult to determine whether an identification is made from memory or because of a judgment that the police believe the person to be the offender. ***Id.*** at 460; Judges, ***Two Cheers***, 43 Ark. L. Rev.

at 264. Finally, the witness is unlikely to be aware of the likelihood and danger that the suggestiveness of the showup will influence his or her identification. Yarmey *et al.*, ***Accuracy of Showups***, 20 L. & Hum. Behav. at 460. For these reasons, researchers have concluded that "the likelihood for misidentifications of innocent suspects is too high for police to continue to use one-person lineup identifications." ***Id.*** at 475.

These reasons can be illustrated further by considering the fuller research into what factors affect the suggestiveness of a lineup. One factor is lineup composition, which refers to the question of who was in the lineup and the extent to which there was enough similarity between the suspect and the other lineup members (fillers) to make the lineup fair to the suspect. Experiments demonstrate that the chances that the witness will identify an innocent suspect increase dramatically when the fillers in the lineup do not fit the eyewitness's description of the offender. Wells *et al.*, ***Eyewitness Identification Procedures***, 22 L. & Hum. Behav. at 615-16.

Another factor in lineups concerns the failure to warn eyewitnesses prior to the lineup that the actual offender might not be in the lineup. A lineup contains a suspect and several fillers, but whether the suspect is the offender or not (and thus whether the lineup contains the offender) is yet to be determined. Eyewitnesses may assume that the offender is in the lineup and that their task is to find him. The entire proceeding can thus implicitly convey the message that the police know who committed the crime and that the offender is in the lineup, even if that is not the case. Failing to warn the eyewitnesses that the offender might not be in the lineup results in high rates of witnesses attempting an identification even when the offender was not in the lineup. Olson and Wells, ***Eyewitness Testimony***, 54 Ann. Rev. Psychol. at 286-87; Wells *et al.*, ***Eyewitness Identification Procedure***, 22 L. & Hum. Behav. at 615.

With instructions emphasizing that the offender might or might not be in the lineup, the rate of attempted identification was reduced significantly. Olson and Wells, ***Eyewitness Testimony***, 54 Ann. Rev. Psychol. at 286-87. There is no general guideline for warning the witness that the person may not be the offender, and there is no indication in the record that Hiltsley was given such a warning in this case.

Another factor is whether the lineup occurs after the witness has mistakenly identified a person from a previous photo lineup. Research shows that in that situation, a later identification test involving that person is likely to produce the same result because viewing multiple lineups interferes with the witness's ability to correctly identify the offender. Tiffany Hinz and Kathy Pezdek, ***The Effect of Exposure to Multiple Lineups on Face Identification Accuracy***, 25 L. & Hum. Behav. 185, 196 (2001). Indeed, in general repeated suggestions to a witness, whether through showing the same person or otherwise conveying the same information multiple times, can have a powerful contaminating effect. Judges, ***Two Cheers***, 53 Ark. L. Rev. at 247-48. Thus, a suggestive identification evidence gathering procedure will taint later identification procedures involving the same witness and suspect. This means that a showup done early in an investigation will be difficult, if not impossible, to overcome with any later less-suggestive procedure. In terms of this case, it is noteworthy that there were three serial showups, all of which would have the effect of influencing any future identification.

Beyond the content of lineups, another source of suggestiveness concerns the ways that behaviors of investigators in the case might influence the witness's identification or the confidence that the eyewitness expresses in the identification. Questioners may unintentionally, and often without awareness, influence people's answers to their questions by the knowledge that the questioner has about the subject matter. Judges, ***Two***

Cheers, 53 Ark. L. Rev. at 247-49. This becomes a concern when lineups are routinely conducted by the officer investigating the case. Wells *et al.*, ***Eyewitness Identification Procedures***, 22 L. & Hum. Behav. at 627. That officer is aware of which member of the lineup is the suspect and which members of the lineup are merely fillers. Experiments have shown that the lineup administrators' "information" influences witnesses to pick that person, even when that person is not the offender. ***Id.*** at 627-28. In addition, the lineup administrator's knowledge of which person is the suspect leads witnesses who pick that person to do so with more confidence, even if they have picked the wrong person. ***Id.*** at 628. Obviously, the officers handling a showup is almost invariably one involved in investing the crime, as happened in this case. Thus, the effect observed in lineups is similarly likely to occur in showups.

In short, showups are, as ***Stovall*** noted in 1967, "widely condemned" for very good reasons. The scientific research undertaken since then has made clear how suggestive they are, and why. It has also shown how likely it is that a suggestive procedure, whether lineup or showup, will taint further identification by a witness. This has been part of the concern that has led the researchers who have created guidelines for the collection of eyewitness evidence to express "grave concerns about the use of show-ups." Wells *et al.*, ***Eyewitness Identification Procedures***, 22 L. & Hum. Behav. at 631.

This research supports the conclusion that showups should be considered *per se* suggestive. But that by itself is not enough, for under the current two-prong test evidence of the showup could still be admitted if it passes the five-factor reliability prong. As the next section shows, the suggestiveness of a showup cannot be redeemed using the five-factor test because it does not effectively keep out unreliable evidence.

b. The five-factor reliability test does not alleviate the taint of suggestive procedures.

Questions were raised about the five-factor reliability test not long after it was adopted. *See* Wells *et al.*, ***Eyewitness Identification Procedures***, 22 L. & Hum. Behav. at 631. Initially, the questions raised two related points.

First, it was noted that the five criteria were heavily weighted toward what psychologists call "self-report" variables—that is, variables that are assessed by asking the subject to assess it him or herself. Judges, ***Two Cheers***, 53 Ark. L. Rev. at 265. For instance, the witness's opportunity to view is assessed by asking the eyewitness to estimate how long the offender's face was in view and whether the witness's view was blocked during any part of this time. The problem is that self-reports can be very unreliable. In fact, eyewitnesses' estimates of time during witnessing are greatly overestimated, especially when there is stress or anxiety at the time of witnessing, and the proportion of time that a person's face is blocked is greatly underestimated by eyewitnesses. Rosenberg, ***Rethinking the Right to Due Process***, 79 Ky. L. Rev. at 278-79. In effect, by relying on self-reports the very eyewitness whose memory is being called into question is being asked to assess his or her own memory.

Second, as other courts have noted, the criteria are not particularly relevant to eyewitness identification accuracy. *See* ***Long***, 721 P.2d at 488-91 (citing literature). Indeed, some of the factors "flatly contradicted" by empirical studies. ***Id.*** at 491 For instance, the evidence does not show a close correspondence between the description given by the eyewitness and the likelihood that the identification is accurate. Rosenberg, ***Rethinking the Right to Due Process***, 79 Ky. L. Rev. at 277. Further,

the evidence shows that a witness's confidence in the accuracy of his or her identification is not strongly related to accuracy at all. Wells *et al.*, ***Eyewitness Identification Procedures*** 22 L. & Hum. Behav. at 621-22. Yet a jury is very likely to be impressed by such accuracy and to "overbelieve" the witness. ***Id.*** at 620-21, 624. *See also* Penrod and Cutler, ***Mistaken Identification*** at 94-95, 195-96. In this case, the victim testified to being "98%" confident in his identification (65:32; 71:98), a number that the research suggests would have impressed the jury.

In addition, there are other factors that may influence the reliability of identifications are not explicitly mentioned in the test's formulation or consistently or prominently used by courts in assessing reliability. For example, factors that are relevant to this case that suggest less accuracy in the identification include the fact that Hiltsley is white while Dubose is black. It is well-established that people are more accurate in identifying people of their own race than they are in identifying people of different races. Cutler and Penrod, ***Mistaken Identification*** at 104. *See also* ***State v. Cromody***, 158 N.J. 112, 120-23, 727 A.2d 457, 461-63 (1999); ***State v. McMorris***, 213 Wis. 2d 156, 170 n.9, 570 N.W.2d 384 (1997). Further, while Hiltsley believed he "recognized" Dubose as a customer in a store he worked in (65:21, 29; 71:81), research shows that seeing a person in a different context affects the ability to recognize even a previously-known face. Cutler and Penrod, ***Mistaken Identification*** at 108-10. Also, Hiltsley said a gun was used in the crime, and the presence of a weapon makes people less reliable observers of faces. ***Id.*** at 101-02. Finally, Hiltsley admitted that he had been drinking and "had a buzz on" (65:23-24; 71:95). The use of alcohol likely has an effect on memory acquisition and retention. ***Id.*** at 88-89.

The Supreme Court has stated expressly that the five reliability factors are to be "weighed [against] the corrupting effect of the suggestive identification"

procedure. ***Manson***, 432 U.S. at 114. As the courts recognized and scientific evidence demonstrates, a suggestive procedure may have a considerable effect on the reliability of any subsequent identification. But the effect of a suggestive identification procedure on reliability may be the most problematic aspect of the five-factor test. This problem is that the second prong (the five accuracy criteria) is not independent of the first prong (was the procedure suggestive?). Instead, the use of suggestive procedures not only increases the risk of mistaken identification; it also increases the witness's standing on the accuracy criteria that are used in the second prong.

This problem can be illustrated from experiments in which suggestive post-identification comments were given to eyewitnesses. In these experiments, eyewitnesses to simulated crimes were given six-person photo lineups and asked to identify the offender. After making a mistaken identification, some eyewitnesses were given the suggestive comment "good, you identified the suspect" while others were told nothing. Wells, *et al.*, ***Eyewitness Identification Procedures***, 22 L. & Hum. Behav. at 631, *citing* Gary L. Wells and Amy Bradfield, ***"Good, You Identified the Suspect:" Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience***, 83 J. Appl. Psychol. 360 (1998).

Later, the eyewitnesses were asked a series of questions about their witnessing experience, including how certain they were of their identification, how good a view of the offender they had and how well they were able to make out specific features of the offender's face. The results showed that those witnesses who were given the suggestive comment gave much higher estimates on every one of these questions. Not only did the suggestive comment distort witnesses' answers about certainty, but it also led them to say that they had a better view. In other words, the suggestion led to better answers on the factors used in the second prong of the test to assess reliability.

The self-reports that are used to assess reliability are not particularly indicative of accuracy under the best of circumstances, but they are actually misleading when a suggestive procedure is involved. Wells, *et al.*, ***Eyewitness Identification Procedures***, 22 L. & Hum. Behav. at 631. *See also* Gary L. Wells, ***What is Wrong with the Manson v. Brathwiate (1977) Test of Eyewitness Identification Accuracy?*** 8-9 (n.d.), at http://www.psychology.iastate.edu/faculty/gwells/Manson problem.pdf (last visited December 1, 2004); Collins, ***Improving Eyewitness Evidence Collection***, 2003 Wis. L. Rev. at 539-40; Judges, ***Two Cheers***, 53 Ark. L. Rev. at 264-65.

In short, the criteria for assessing accuracy in the second prong of the two-prong test might be appropriate only if there is *no* suggestiveness in the identification procedure to begin with. If the procedure is suggestive, then the criteria that are used in the second prong are themselves contaminated by the existence of the suggestive procedure. The existence of suggestiveness (as determined in the first prong) serves to help guarantee that the witness will pass the second prong, which is then used to justify not being concerned about the suggestive procedure.

The science thus illustrates the importance of taking care that a suggestive procedure does not contaminate the witness's "trace" evidence of identification. Indeed, this point has been stated forcefully by one commentator:

> If, as the empirical evidence indicates, (a) eyewitness identification testimony is a singularly potent source of inculpatory evidence, (b) legal decision makers (prosecutors, jurors, and courts) in making credibility determinations look both to eyewitness confidence and to factors that rely heavily on "memory-based self-reports from the very eyewitnesses whose memory is being called into question," and (c) both witness confidence and

> witness memory are subject to contamination by post-event influences, then the use of contaminating identification procedures can be expected to contribute to erroneous convictions.

Judges, ***Two Cheers***, 53 Ark. L. Rev. at 266. Accordingly, it is appropriate for this court to adopt a rule that avoids contributing to the risk of erroneous convictions.

C. The remedy for the problem of suggestive identification procedures is a *per se* rule of exclusion.

The departure from the due process touchstone of ***Stovall*** that culminated in ***Manson***'s two-prong reliability test has created a test that does not keep unreliable eyewitness identification evidence from being admitted at trial. As the dissent in ***Manson*** said, "[t]he dangers of mistaken identification are . . . simply too great to permit unnecessarily suggestive identifications." ***Manson***, 432 U.S. at 125 (Marshall, J., dissenting). The dissent also presciently stated that the test "will allow seriously unreliable and misleading evidence to be put before juries" by allowing continued use of "needlessly inaccurate and ineffective investigatory techniques." ***Id.*** at 127, 128. Returning to the approach of ***Stovall*** and making fair procedures the linchpin of the inquiry will not only validate a defendant's due process interests; it will also do a better job of ensuring reliable identification evidence.

1. The legal basis for adoption of a new rule regarding suggestive identification procedures.

As already noted, Wisconsin courts have adopted the ***Manson*** test. They did so citing to the federal cases' conclusions about the requirements of due process. *See, e.g.*, ***Wolverton***, 193 Wis. 2d at 264; ***Powell***, 86 Wis. 2d at 61-65; ***Jones v. State***, 47 Wis. 2d 642, 648, 178

N.W.2d 42 (1970). They did not explicitly say that the due process clause in Art. I, sec. 8 of the Wisconsin Constitution is substantially equivalent to the federal due process clause and that they were therefore conforming the interpretation of Wisconsin's due process clause to the federal courts' interpretation of the similar federal due process clause. *Cf.* ***State v. Greenwold***, 189 Wis. 2d 59, 71, 525 N.W.2d 294 (Ct. App. 1994) (finding the state's due process clause provided no greater protection than the federal due process clause on the issue of destruction of evidence).

The state constitution may be interpreted to provide greater protections than the federal constitution. ***State v. Hansford***, 219 Wis. 2d 226, 242, 480 N.W.2d 171 (1998); ***State v. Doe***, 78 Wis. 2d 161, 171-72, 254 N.W.2d 210 (1977). The broad purpose of the state constitution as a whole is to give primacy to the freedoms individuals enjoy as a matter of natural right. The constitution does not create rights; rather, it was adopted to protect our inherent rights. Wis. Const. Art. I, sec. 1; ***Nunnemacher v. State***, 129 Wis. 190, 200, 108 N.W. 627 (1906). The preamble to our constitution gives precedent to the preservation of liberty over the establishment of government; thus, the constitution was not intended to grant the government power that subverts those primary rights. ***State ex rel. Zillmer v. Kreutzberg***, 114 Wis. 530, 532-33, 90 N.W. 1098 (1902). And, by the constitution's own command, basic rights and the constitution's purpose in protecting them must be effectuated "by frequent recurrence to fundamental principles." Wis. Const. Art. I, sec. 22; ***State ex rel. Van Alstine v. Frear***, 142 Wis. 320, 343-54, 125 N.W. 961 (1910) (Marshall, J., concurring).

One of these principles is fundamental fairness, which underpins the concept of due process of law. ***State v. Noble***, 2002 WI 64, ¶ 19, 253 Wis. 2d 206, 646 N.W.2d 38, *citing* ***State ex rel. Lyons v. De Valk***, 47 Wis. 2d 200, 205, 177 N.W.2d 106 (1970) ("the concern of due process is fundamental fairness"). Unnecessarily

suggestive identification procedures violate the notion of fundamental fairness. They differ from other improper law enforcement activities because they do not further any valid law enforcement interest. For instance, while a violation of a suspect's right to be free from unreasonable searches is wrong, it may still collect relevant and reliable evidence. By contrast, an unnecessarily suggestive identification procedure creates unreliable evidence where reliable evidence might have been gathered instead.

Focusing on the concern for fair procedures in eyewitness identification procedures is consistent with the Supreme Court's recent step back from using reliability as a "linchpin" in another area of law affecting the integrity of the adversary process—namely, the confrontation of witnesses. In fact, "[a]t approximately the same time that the right to due process was being transformed from ***Stovall*** to [***Manson***], the sixth amendment right to confrontation was undergoing similar changes." Rosenberg, ***Rethinking the Right to Due Process***, 79 Ky. L. Rev. at 295-96. Just as the Court determined that the "linchpin" of the right to due process was reliability, it also determined that the "mission" of the confrontation clause was to promote reliability in criminal trials. And, like the five-factor test for the reliability of eyewitness identification evidence, the Court looked to "indicia of reliability" surrounding evidence to gauge its admissibility under the confrontation clause. ***Id.*** (discussing, *e.g.*, ***Ohio v. Roberts***, 448 U.S. 56 (1980)).

But the Court has abandoned its reliance on indicia of reliability in core confrontation clause cases. In ***Crawford v. Washington***, ___ U.S. ___, 124 S.Ct. 1354 (2004), the Court adopted a new test for analyzing the admissibility of hearsay under the Confrontation Clause. The Court determined that the right to confrontation required that for certain hearsay to be admissible the accused must have been afforded the opportunity to cross-examine the declarant, and determining admissibility

based on reliability was not enough. While the Court noted that the confrontation clause's "ultimate goal is to ensure reliability of evidence," it provides a procedural rather than a substantive guarantee. ***Id.*** at 1370.

> It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Id. Similarly, the due process clause's goal is reliable evidence, and requires that the reliability be achieved by the use of fair procedures.

As an alternative to adopting a new rule regarding suggestive identification evidence procedures based on the Wisconsin due process clause, this court should exercise its "administrative authority to promote the efficient and effective operation of the state's court system," a duty based on Art. VII, sec. 3 of the Wisconsin Constitution. ***State v. Jennings***, 2002 WI 44, ¶ 14, 252 Wis. 2d 228, 647 N.W.2d 142, *quoting* ***In re Grady***, 118 Wis. 2d 762, 783, 348 N.W.2d 559 (1984). This administrative power and duty includes "the inherent power to adopt those statewide measures which are absolutely essential to the due administration of justice in the state." ***Jennings***, 2002 WI 44, ¶ 14, *quoting* ***In re Kading***, 70 Wis. 2d 508, 518, 235 N.W.2d 409 (1975).

It is true that this court does not invoke its superintending authority lightly, ***Jennings***, 2002 WI 44, ¶ 15. However, the impact of suggestive procedures and mistaken eyewitness identification evidence has a large impact not only on the criminal justice system, but also on the public's trust in the system and as well as on public safety, for when inaccurate evidence leads to a wrongful conviction, the real perpetrator remains free. These circumstances make a better approach to eyewitness

identification evidence "absolutely essential to the due administration of justice in the state" and therefore justify the court's invocation of its superintending authority.

2. Showups should be considered *per se* suggestive and inadmissible unless the state proves they were necessary, and evidence derived from unnecessarily suggestive procedures should be subject to a *per se* rule of exclusion.

Eyewitness identification evidence derived from pretrial procedures may be divided into three types: 1) evidence derived from unnecessarily suggestive procedures; 2) evidence derived from necessarily suggestive procedures; and 3) evidence derived from properly conducted procedures. Different rules should apply to the first type of eyewitness evidence than apply to the second and third type of eyewitness evidence. Rosenberg, ***Rethinking the Right of Due Process***, 79 Ky. L. Rev. at 303.

First, there should be a *per se* exclusion of evidence that is the product of unnecessarily suggestive eyewitness identification procedures. This rule protects the defendant's due process right to fundamental fairness. In doing so, it restores the distinction between necessarily and unnecessarily suggestive identification procedures that was made in ***Stovall***. As ***Biggers*** acknowledged, unnecessarily suggestive procedures are more problematic than necessarily suggestive ones, for, "[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." ***Biggers***, 409 U.S. at 198.

With adoption of this approach Wisconsin would concededly be in the minority of states, although it would

not be alone. New York and Massachusetts have held that, as a matter of state constitutional law, evidence derived from unnecessarily suggestive identification procedures is to be excluded. ***State v. Johnson***, 420 Mass. 458, 650 N.E.2d 1257 (1995); ***People v. Adams***, 53 N.Y.2d 241, 440 N.Y.S.2d 902, 423 N.E.2d 379 (1981). They did so for precisely the reasons argued here: that the current test "provides little or no protection from unnecessarily suggestive identification procedures, from mistaken identifications and, ultimately, from wrongful convictions." ***Johnson***, 420 Mass. at 466, 650 N.E.2d at 1262.

With regard to showups in particular, the court should hold that they are *per se* suggestive because, as outlined above (Part B.2.a), they create such a substantial likelihood that the identification obtained with them will be irredeemably tainted. By holding that showups are *per se* suggestive, evidence derived from a showup would be excluded unless the prosecution could demonstrate by clear and convincing evidence that it was necessary for the police to conduct a showup. Absent such proof, the showup would be unnecessarily suggestive and thus subject to exclusion.

By restoring the question of necessity for the showup into the analysis, there will, of course, have to be a standard for judging whether the showup was necessary. The test should depend on whether the police face a choice between a showup or no identification procedure at all because there are exigent circumstances that make it likely the witness would have no opportunity to participate in a properly conducted identification procedure at a later time. This is consistent with the U.S. Department of Justice's guideline dealing with showups, which provides that they should be conducted "[w]hen circumstances require the prompt display of a single suspect to a witness." U.S. Dep't of Justice, ***Eyewitness Identification: A Guide*** at 27. *Cf.* Yarmey *et al.*, ***Accuracy of Showups***, 20 L. & Hum. Behav. at 475-76

(suggesting showups not be used except for "possible life or death circumstances").

Stovall involved the paradigmatic situation—the only living witness who was not expected to survive. 388 U.S. at 302. In fact, a number of courts have upheld such hospital room showups where the witness was seriously ill or injured. *See, e.g.*, ***U.S. v. Green***, 436 F.2d 290 (D.C. Cir. 1970); ***U.S. ex rel. Tyrrell v. Jeffes***, 420 F.Supp. 256, 264 (E.D. Pa. 1976); ***Wilkins v. State***, 292 Ark. 596, 731 S.W.2d 775 (1987); ***People v. Garza***, 44 Ill App. 3d 30, 2 Ill Dec. 821, 357 N.E.2d 1264 (1976); ***Duffy v. State***, 275 Ind. 191, 415 N.E.2d 715 (1981); ***State v. Sharratt***, 29 N.C. App. 199, 223 S.E.2d 906 (1976). On the other hand, a hospital showup will be impermissibly suggestive when the victim was not seriously injured or near death. ***State v. Mitchell***, 204 Conn. 187, 527 A.2d 1168 (1987).

At the same time, that the showup allows for a prompt on-the-scene identification should not be a justification that the showup was "necessary." First, there is nothing about the need to get an identification that creates exigency or necessity in and of itself; indeed, the concern should be to allow time for procedures most likely to lead to an accurate identification.

Further, two common arguments for such a prompt on-the-scene showup should not be used to justify the procedure as "necessary." One argument is that a "fresh" showup makes for an inherently more reliable identification. *See, e.g.*, ***State v. DiMaggio***, 49 Wis. 2d 565, 586, 182 N.W.2d 466 (1971); App. 112. But this is true only compared to showups that occur later, not to properly conducted lineups. Yarmey *et al.*, ***Accuracy of Showups***, 20 L. & Hum. Behav. at 464-65, 468. Thus, this cannot be a rationale for preferring showups to properly conducted lineups.

The second argument for the procedure is that it prevents the unnecessary detention of the suspect. This

will not apply in every case. For instance, in this case the police had already developed probable cause to justify the arrest of Dubose and thus could have justified continued detention even without an identification of Dubose (App. 110). *Cf.* ***People v. Johnson***, 169 A.D. 2d 779, 565 N.Y.S.2d 145 (N.Y. App. 1991) (on-site showup suggestive and not justified by exigent circumstances when police had probable cause to arrest defendant based on an earlier identification). Finally, even in cases in which there is not independent probable cause to arrest, a delay to construct a proper identification procedure, such as a photo lineup, that will minimize the risk of mistaken identification will in most cases require the temporary detention of an innocent person. But that temporary detention is a far lesser intrusion on the person's liberty than a wrongful conviction resulting from a prompt, but unnecessary and highly suggestive, showup.[5]

In addition to being an appropriate method of protecting the defendant's due process rights, the *per se* exclusion of evidence derived from unnecessarily suggestive procedures will do a far better job of deterring the police from using such procedures and spur them in adopting stricter, sounder guidelines for the collection of eyewitness evidence. *Cf.* ***Manson***, 432 U.S. at 125 (Marshall, J., dissenting). The current two-prong test does not provide any incentive for law enforcement to change its practices. Cases in which suggestive procedures are used "abound in the lower courts and the state courts." Rosenberg, ***Rethinking the Right to Due Process***, 79 Ky. L. Rev. at 305; ***Johnson***, 650 N.E.2d at 468. Indeed, this case is one in which a suggestive procedure that was condemned years ago was still used three times. Further, as long as suggestive procedures help guarantee that the witness will pass the second prong of the test, the test will actually reward the use of suggestive procedures.

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[5] *But see* Wells, ***Police Lineups***, 7 Psychol. Pub. Pol. & L. at 795-96 (noting the difficult policy balance that courts must undertake on this point).

It is true that one state—New Jersey—has, through its Attorney General, acted to adopt better procedures and train law enforcement officers in using them. *See*. Collins, ***Improving Eyewitness Evidence Collection***, 2003 Wis. L. Rev. at 565. While that is exemplary, it is also a single case. Enunciation of a stricter rule of admissibility by this court will give Wisconsin law enforcement agencies a greater impetus to act. *Cf.* ***Id.*** at 565-67 (noting that the court system has a role to play in improving eyewitness identification procedures but, because of existing precedent, can act mainly as "final safety net").

The two remaining types of eyewitness identification evidence—evidence derived from necessarily suggestive procedures and evidence derived from properly conducted pretrial procedures—do not raise procedural fairness concerns. However, this evidence still poses the problem of reliability, for it is still the case that the defendant has a due process right not to have unreliable evidence used against him and either of these types of testimony may infringe upon that right. Rosenberg, ***Rethinking the Right to Due Process***, 79 Ky. L. Rev. at 306.

The method for handling this evidence is essentially the one in ***Manson***. It would require courts to review eyewitness testimony that is derived from pretrial identification procedures and assure that it passes a threshold of reliability before it may be admitted at trial. Obviously, the five-factor test would have to be revised to, for example, eliminate the reference to the witness's confidence in her identification. It also would have to take into account additional relevant factors, such as whether the eyewitness and the defendants are of the same race. Further, it should require explicit consideration of the identification procedure used so the court could gauge whether and to what extent the procedure contaminated the identification. Because the state conducted the identification procedure and is the

proponent of the evidence, it should bear the burden in cases of necessarily suggestive procedures.

For purposes of this case, the only identification procedure that needs to be analyzed is the showup. There is nothing in the record to support a conclusion that the use of the showup was necessary under the facts of this case. Hiltsley, the victim, was not injured during the robbery. The police had probable cause to arrest Dubose even before the showups. By virtue of the fact they showed Hiltsley a picture of Dubose after the second station-house showup, it is clear the police had a photograph either already in hand or shortly after the arrest that could have been used to construct a non-suggestive photo lineup. Under the rule suggested above, the showups in this case were unnecessarily suggestive and should have been suppressed without further inquiry into the reliability of the identification.

CONCLUSION

For the reasons given above, this court should hold that showups are *per se* suggestive and evidence derived from showups is to be excluded unless the showup was necessary under the circumstances of the case. Because the showups in this case were not necessary, the showup evidence should have been suppressed, and Tyrone Dubose is entitled to new trial at which that evidence may not be introduced.

Dated this 2nd day of December, 2004.

Respectfully submitted,

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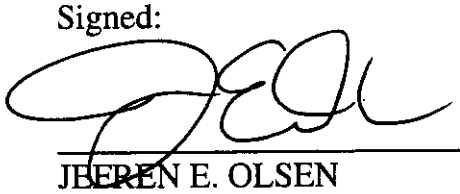
CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per full line of body text. The text is 13 point type and the length of the brief is 10,879 words.

Dated this 2nd day of December, 2004.

Signed:



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APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1690-CR Cir. Ct. No. 02CF000028

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYRONE L. DUBOSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Tyrone Dubose appeals from a judgment of conviction for armed robbery. He claims the trial court erred by not suppressing Timothy Hiltsley's identification of him as the armed robber because it was either the fruit of an illegal arrest or was the product of impermissible suggestiveness. We affirm the judgment.

BACKGROUND

¶2 On January 9, 2002, around 1 a.m., Hiltsley left a bar in Green Bay with his friend, Ryan Boyd. Hiltsley had been drinking and was at that time "buzzed." Outside, they ran into a group of people, which included Dubose. Hiltsley recognized Dubose as a patron of a liquor store where he used to work. Hiltsley, Boyd, Dubose, and another decided to go back to Hiltsley's house to smoke marijuana. They left together in Hiltsley's vehicle, made one stop along the way, and arrived at the house shortly thereafter. About five to ten minutes after arriving, Dubose pulled out a gun, put it against Hiltsley's temple, and told him to empty his wallet. Hiltsley complied, and Dubose and the other person left.

¶3 Shortly after the robbery, a neighbor who lived a few doors down from Hiltsley called the police complaining of a possible burglary. She said she saw two people run out of a house next to hers and head eastbound down Division Street. She described one of the individuals as wearing a large flannel shirt with a hood. The police responded to the call at approximately 1:21 a.m.

¶4 Meanwhile, Hiltsley and Boyd ran out of the house and started chasing the suspects, but then Hiltsley and Boyd got into Boyd's car and drove after the suspects, hoping to cut them off. A block and a half later, at the intersection of Division and North Norwood Avenue, Hiltsley got out of the car to look for Dubose and the other person while Boyd began circling the neighborhood. Hiltsley headed south on Norwood and flagged down a police vehicle that was responding to the burglary call. He told the officer he was robbed at gunpoint. He described the suspects as two African-American males, one around five-feet-six-inches tall, and the other a bit taller.

¶5 Officer Jeffrey Engelbrecht was also responding to the burglary call. He was about six blocks away from the scene. Dispatch indicated that two suspects were involved, one wearing a large flannel shirt with a hood. As he neared the site of the call, Engelbrecht observed two individuals walking eastbound on Division, about a half-block away from Hiltsley's residence. One of them wore a large checkered flannel shirt with a hood. Engelbrecht was unable to determine their race. When he turned his squad car (which did not have its emergency lights on) north onto Norwood, the two individuals ran eastbound on Division, across Norwood, and then darted between two houses in a northeasterly direction. Engelbrecht lost sight of them. He notified headquarters that he just observed two possible suspects. He then drove one block north, stopped at the intersection of Norwood and Kellogg Street, radioed to set up a one-block perimeter to contain the fleeing suspects and called for a canine unit. The perimeter was set up within a minute and a half.

¶6 Engelbrecht then received word that two other officers were dispatched to Hiltsley's address, 943 Division Street, for an armed robbery. Dispatch indicated the suspects involved were two African-American males. Dispatch further advised that this call may be related to the burglary call.

¶7 Approximately fifteen minutes later deputy Timothy Newtols and his canine partner, Rocky, arrived. Engelbrecht informed Newtols a possible armed robbery suspect was in the area and took Newtols and Rocky to the last place he saw the two possible suspects. Rocky immediately began tracking eastbound. He went through several backyards until he stopped and detained (terminology used for when a canine barks and holds) at a backyard fence at 807 Kellogg Street. This house was located within the one-block perimeter. Newtols

ordered whoever was hiding behind the fence to come out, and Dubose, an African-American male, complied. Dubose was not wearing a flannel shirt.

¶8 Engelbrecht directed Dubose to the ground and placed him in custody. After learning Dubose's identity, Engelbrecht moved him to the rear of a squad car and searched him. The search did not uncover the weapon, the money or any other contraband. Engelbrecht then double-locked the handcuffs and placed Dubose in the back of a squad car, where he sat for approximately ten minutes.

¶9 An officer brought Hiltsley to the squad car where Dubose was being held to see if he could identify Dubose as one of the perpetrators. The officer told Hiltsley that they had someone who could possibly be one of the men who robbed him. The officer parked this car approximately three feet from the other car. Hiltsley, who was sitting in the backseat, looked into the other car, which was illuminated by a dome light. Based on Dubose's slender build, dress and hairstyle, Hiltsley said he was 98% sure Dubose was the man who robbed him.

¶10 Dubose and Hiltsley were taken to a police station. Dubose was placed in a room, and Hiltsley, standing behind a two-way mirror, again identified Dubose as the man who robbed him. This second identification occurred approximately fifteen minutes after the first one.

¶11 Sometime after Dubose was taken to the police station, Engelbrecht and his partner retraced Rocky's tracking pattern to see if they could locate a handgun. Near the location where Engelbrecht lost sight of Dubose and the other man when they darted between the two houses, a semi-automatic pistol was found.

¶12 Dubose was charged with one count of armed robbery. He filed a motion to suppress the identifications, arguing that they were either the fruit of an unlawful arrest or were impermissibly suggestive. The trial court denied his motion, and the matter was tried before a jury. At trial, Hiltsley again identified Dubose as the man who robbed him. The jury convicted him, and this appeal follows.

DISCUSSION

¶13 We employ a two-step test in reviewing a circuit court's denial of a motion to suppress. First, we examine the circuit court's factual findings under the clearly erroneous standard. ***State v. Vorburger***, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829. Second, we review independently the application of those facts to constitutional principles. ***Id.*** Dubose does not dispute any of the circuit court's factual findings, and our review of the record does not reveal that any of the factual findings are clearly erroneous. Therefore, we turn to Dubose's constitutional arguments.

I. SUPPRESSION BASED ON ILLEGAL ARREST

¶14 Dubose claims the identification evidence should have been suppressed because he was arrested without probable cause. *See* ***State v. Walker***, 154 Wis. 2d 158, 185-87, 453 N.W.2d 127 (1990) (lineup identification may be suppressed if it is the fruit of an unlawful arrest). The State argues that Dubose was not arrested, but rather was subject to an investigative detention for purposes of a showup identification. Alternatively, if Dubose was under arrest, the State claims there was probable cause to arrest Dubose.

A. Arrest or Investigatory Detention

¶15 An arrest occurs when, given the degree of restraint, a reasonable person in the defendant's position would have considered him or herself to be in custody. ***State v. Swanson***, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991). To make this determination, we look at the totality of the circumstances, ***id.*** at 446, and because each case must be examined under its own facts, we are not bound by hard and fast rules. ***State v. Wilkens***, 159 Wis. 2d 618, 626, 465 N.W.2d 206 (Ct. App. 1990).

¶16 The State argues Dubose was not under arrest, but rather was subject to an investigatory stop.

> For the stop of a person to pass constitutional muster as investigatory, the detention must be temporary and last no longer than is necessary to effect the purpose of the stop. "Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." ... In assessing a detention's validity, courts must consider the "'totality of the circumstances—the whole picture,'" because the concept of reasonable suspicion is not "'readily, or even usefully, reduced to a neat set of legal rules.'" The manner in which a temporary detention of a suspect is created must be gauged by a standard of reasonableness.

Id. at 625-26 (citations omitted).

¶17 The State argues that none of the officers' actions, individually or in the aggregate, are incompatible with an investigatory stop. In support of its argument, the State calls attention to ***Wilkins*** and ***State v. Pounds***, 176 Wis. 2d 315, 500 N.W.2d 373 (Ct. App. 1993).

¶18 In ***Wilkins***, police responded to a dispatch involving a screaming woman being dragged into a garage. The police arrived at the given address and spoke to a witness who pointed out that the suspects were in an automobile that was fortuitously passing that address right then. ***Id.*** at 626. The police immediately stopped the passing vehicle, ordered the occupants out (one of whom was Wilkins), handcuffed them, and placed them in separate squad cars, ***id.*** at 626-27, for approximately an hour to an hour and twenty minutes. ***Id.*** at 628. In the meantime, the police searched for and located the victim, returned her to the crime scene, received her statement, and then took her to the stopped vehicles to identify the suspects. She identified Wilkins as one of the assailants. ***Id.*** at 627-28. On these facts, we concluded Wilkins' detention did not ripen into an arrest. ***Id.*** at 628.

¶19 In ***Pounds***, a police officer stopped the vehicle Pounds and two other persons were in because the vehicle did not match the license plate registration information. The officer issued the driver a citation, informed him that the vehicle was going to be towed, and told all three of the occupants that they were free to leave. ***Id.*** at 318. Pounds and the driver left the scene, while the other passenger waited for the tow truck with the officer. While waiting, the officer noticed a short-barreled shotgun under the front seat of the car. The officer handcuffed the passenger and radioed another officer to find Pounds and the driver and bring them back to the scene. The officer located them in a restaurant and ordered them to the ground at gunpoint. They were then frisked, handcuffed, and transported back to the scene of the traffic stop where, in response

to police questioning without ***Miranda*** warnings,[1] Pounds admitted the shotgun was his. ***Id.***

¶20 In a ***Miranda*** analysis, we concluded Pounds was subjected to a degree of restraint associated with formal arrest that required ***Miranda*** protections. ***Pounds***, 176 Wis. 2d at 322. However, we alluded to the fact that Pounds was nevertheless subject to a ***Terry*** stop.[2] We stated:

> We do not quarrel with the state's assertion that the officers involved engaged in good investigative police work. [The officer] had the right to protect himself by ordering Brown and [the driver] to the ground at gunpoint. He had the right to frisk the men. He had the right to handcuff them, and to transport them in his patrol car back to the scene of the initial traffic stop.
>
> ... We disagree with the trial court's implicit assumption that ***Miranda*** is never implicated in the context of a ***Terry*** stop.

Pounds, 176 Wis. 2d at 322.

¶21 Putting these cases together, the State argues that neither directing Dubose to the ground at gunpoint, nor handcuffing him, nor placing him in the back of a squad car for only ten minutes would lead a reasonable person to believe he or she was under arrest. We are not persuaded.

¶22 We agree that ***Pounds*** approved using firearms to direct someone to the ground under the facts of the case, that both ***Pounds*** and ***Wilkins*** held that handcuffs do not necessarily transform a stop into an arrest, and that the length of

---

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[2] ***Terry v. Ohio***, 392 U.S. 1 (1968).

the detention in ***Wilkins***, anywhere from an hour to an hour and twenty minutes, is significantly longer than what occurred here, ten minutes. If that were all that occurred in this case, we may agree that Dubose was subject to an investigatory detention. However, the difficulty here is that the State cannot justify the officer's actions in searching—again, not frisking—Dubose's person, aside from pointing out that the search was fruitless. The fact that the search did not return any incriminating evidence, however, cannot obscure the fact that a reasonable person would correlate a search of his or her person to be associated with being in custody. On this ground, ***Wilkins*** and ***Pounds*** are not controlling here.

¶23 Given that Dubose was directed to the ground at gunpoint after being discovered, handcuffed,[3] searched, and then placed in the backseat of a squad car for ten minutes, we agree with the trial court that Dubose was placed under arrest.

B. Probable Cause

¶24 The next issue is whether there was probable cause for the arrest. Dubose argues the evidence, at best, supports nothing more than a reasonable suspicion justifying further investigation. We disagree.

¶25 Probable cause is that quantum of evidence that would lead a reasonable police officer to believe that the defendant probably committed a crime. ***State v. Ritchie***, 2000 WI App 136, ¶8, 237 Wis. 2d 664, 614 N.W.2d 837. "There must be more than a possibility or suspicion that defendant committed an

[3] The testimony from the suppression hearing on this point is unclear. Engelbrecht testified that after Dubose was located, Engelbrecht directed him to the ground and "placed him in custody." We take this as meaning he placed Dubose in handcuffs while Dubose was on the ground. This supposition is supported by the fact that Engelbrecht testified that after he searched Dubose, he double-locked the handcuffs before placing Dubose in the back of a squad car.

offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." ***Id.*** Probable cause determinations must be made on a case-by-case basis, looking at the totality of the circumstances. ***State v. Multaler***, 2002 WI 35, ¶34, 252 Wis. 2d 54, 643 N.W.2d 437.

¶26 Based upon the totality of the circumstances, we conclude there was probable cause. First, the entirety of the events occurred in the early morning hours when there were few people out on the streets. *See* ***State v. Flynn***, 92 Wis. 2d 427, 447, 285 N.W.2d 710 (1979) (time of day is a relevant factor). Second, Engelbrecht noticed two people in the very near vicinity of the burglary call, about a block and a half away, shortly after the call was made. Third, because one of the individuals wore a flannel shirt with a hood, they matched the description given in connection with the burglary call. Fourth, the then suspects ran away from Engelbrecht after he turned his vehicle in their direction. *See* ***Illinois v. Wardlow***, 528 U.S. 119, 124-25 (2000) (flight from the police, although not dispositive, can be a relevant factor). Fifth, within a minute and a half, Engelbrecht set up a one-block perimeter to lock-down the area. Sixth, while waiting for the canine unit to arrive, Engelbrecht heard a dispatch regarding an armed robbery involving two African-American male suspects. Dispatch further advised this call may be related to the earlier burglary call. Seventh, Rocky, the canine partner, immediately picked up the scent of the suspects who ran away from Engelbrecht and ultimately tracked Dubose to a location that was within the officers' one-block perimeter. Eighth, Dubose was hiding in someone's backyard behind a fence. Ninth, after being told to come out, Dubose, an African-American male, appeared and fit the description from the armed robbery dispatch. The sum total of these events constitutes probable cause.

¶27 Because we conclude there was probable cause to arrest Dubose, Hiltsley's subsequent identifications are not the fruit of an unlawful government act. *See* ***Walker***, 154 Wis. 2d at 185-86.

II. SUPPRESSION BASED ON IMPERMISSIBLE SUGGESTIVENESS

¶28 Alternatively, Dubose argues that the identification evidence should not have been admitted because the out-of-court showups were impermissibly suggestive. A criminal defendant is denied due process if identification evidence presented at trial stems from pretrial police procedure that is so impermissibly suggestive that it creates a "very substantial likelihood of irreparable misidentification." ***State v. Wolverton***, 193 Wis. 2d 234, 264, 533 N.W.2d 167 (1995). The defendant has the burden to prove suggestiveness based upon the totality of the circumstances. ***Id.***; *see* ***State v. Kaelin***, 196 Wis. 2d 1, 10, 538 N.W.2d 538 (Ct. App. 1995).

¶29 As to the first identification that occurred while Dubose and Hiltsley were in separate squad cars, Dubose weaves the following four events together to claim impermissible suggestiveness: (1) he was sitting alone in the backseat of a police car; (2) Hiltsley was "buzzed"; (3) the identification occurred shortly after the armed robbery occurred while Hiltsley was upset from the ordeal; (4) the officers suggested they may have caught "one of the guys." We conclude Dubose has not met his burden.

¶30 First, Dubose concedes that sitting alone in a police car is insufficient to demonstrate a showup was impermissibly suggestive. *See* ***Wolverton***, 193 Wis. 2d at 265.

¶31 Second, Dubose has not provided any authority to justify placing the identifier's condition, in and of itself, at issue as it relates to determining whether the police procedure creates impermissible suggestiveness. We agree with Dubose that we are to look to the totality of the circumstances to determine whether a showup was suggestive, *see* ***Kaelin***, 196 Wis. 2d at 10, and that the identifier's condition at the time of the identification relates to the reliability of the identification. But we are not persuaded that for purposes of proving a constitutional violation the identifier's condition, wholly divorced from procedures used by the police, is relevant to proving that a showup was impermissibly suggestive.

¶32 Third, the supreme court has held that the closer in time an identification occurs to the commission of the crime, the greater the identification's integrity is. ***State v. DiMaggio***, 49 Wis. 2d 565, 586, 182 N.W.2d 466 (1971). The court stated, "We believe that prompt identification, or lack of identification, promotes justice for victim and suspect. An immediate confrontation is inherently more reliable than a delayed one, while failure to identify terminates any inconvenience to the suspect." ***Id.***; *see also* ***Johnson v. State***, 47 Wis. 2d 13, 18, 176 N.W.2d 332 (1970) (identification proximate to the time of the offense promotes fairness by assuring reliability).

¶33 Finally, Dubose has not provided any authority to support the position that an identification is impermissibly suggestive when police officers tell a victim they "may have one of the guys." Moreover, we see nothing wrong with a police procedure where officers indicate an individual is a possible suspect. Even if this contains some suggestiveness, it certainly does not rise to the level of impermissible suggestiveness. Therefore, we conclude Dubose has not proved the first identification was impermissibly suggestive.

¶34 As to the second identification that occurred at the police station, Dubose protests that he was the only individual shown to Hiltsley. Again, the fact that Dubose was the only suspect shown to Hiltsley does not, of itself, render a showup impermissibly suggestive. *See* ***Wolverton***, 193 Wis. 2d at 265. "To hold otherwise would be tantamount to holding that all showups are impermissibly suggestive, which would run counter to our prior decisions stating that showups are not *per se* impermissibly suggestive." ***Id.***

¶35 Dubose also objects to the proximity of this showup with the first identification, which occurred just fifteen minutes earlier. Dubose claims this short time span did not allow for a separate and independent identification, but rather merely allowed the witness to confirm the earlier mistaken identification. We reject this argument for two reasons.

¶36 First, to the extent that Dubose claims this second identification was premised on an earlier mistaken identification, we note that our inquiry rests solely on the suggestiveness of the police procedures used in garnering an individual's identification and whether those procedures create impermissible suggestiveness. Therefore, Dubose's contention that the second identification allowed Hiltsley to confirm an earlier mistake misses the point.

¶37 Second, Dubose has not provided any authority to support his assumption that a subsequent identification must occur after a period of time has lapsed to ensure the identification is separate and independent, thereby preventing impermissible suggestiveness. In reality, Dubose's argument relates only to the reliability of the identification. Without there being any impermissible suggestiveness in the second showup, the reliability of the identification is

immaterial for our purposes of considering whether a defendant's due process rights have been violated.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

Defendant met that description.

The other is that they maintained this one block radius cut off within a very short period of time. So, the chances that another African American male had committed the armed robbery it seems to me were greatly reduced because of that. There was limited access to this area. There are not a lot of African American people who live in Brown County.

This, these people were running through yards at 1:21 in the morning. The Defendant was hiding behind a fence. Most people do not hide behind a fence at 1:30 or 1:35 in the morning. So, if you put together the fleeing, the relatively small population of black males in this community, the timing, the limited access to the neighborhood, because the police officers had maintained the radius, the fact that he is hiding behind a fence, I think you put all of that together and there is probable cause to believe that he was involved in the armed robbery. That is a very short period of time. It is in very close proximity, limited access by other people, suspicious hiding, fleeing type behaviors. I think you put all of those together and it totals probable cause if you look at the reasonable inferences under the circumstances at the time.

Having said that, then I next need to address the argument that the identifications were impermissibly

suggestive. As I understand it, there were two, actually, three identifications. Although, I didn't hear a lot of testimony about the photographs. The first identification occurred when the Defendant was in the back of a squad and the victim was in the back of another squad. At some point, the victim got into a different squad for the purpose of going down to the station to give a statement. And in the meantime, an officer transported the Defendant in a squad. And they pulled up basically next to each other. It seems pretty clear the dome light was on. The squads were relatively close together, a couple of feet apart. And the victim testified that he was very certain about the identification of the Defendant. He admitted that he was very upset at the time. That he was probably 98 percent sure that it was the Defendant who had the gun. He felt certain of that because the Defendant was more diminutive than the other African American male who was there when the robbery occurred. He was smaller. He was more slender. He based it also on the Defendant's clothing and his hair style, which he found unusual. And according to the victim, what he was told by the officers was that they had a possible suspect, could this possibly be one of the guys? And this occurred in his estimation about 10 to 15 minutes after the robbery had occurred. He later went down to the police station and looked at the Defendant through a two-way mirror, identified

him again at that time. And then also said that he looked at some mug shots and identified him at that time.

This was clearly a one-on-one show-up in the back of the squad cars. And one-on-one show-ups are inherently more suggestive and less reliable than a line-up procedure. But they don't necessarily violate due process for that reason. The standard is whether the procedure that's utilized is unnecessarily suggestive and conducive to having a victim mistakenly identify someone. And that can often be an irreparable mistake in identification, because they will stick with that no matter what, even though it is not a proper identification.

I understand that this Defendant was seated in the squad car. That is some suggestion, I suppose, that it is unnecessarily suggestive; but not necessarily so. The mere fact that a suspect is seated in a squad car during a show-up is not sufficient to prove that it's impermissibly or unnecessarily suggestive. Neither does the fact that the Defendant is handcuffed render a show-up invalid absent some other suggested fact-- suggestive factors to me.

One of the things that I can consider is the nearness in time. The closer in time the identification is to the alleged crime indicates a higher degree of reliability. Assuming that the victim is telling the truth and the officers are telling the truth -- and again, there is

no reason for me to conclude otherwise from the record and from the transcript that I have read -- this happened in a very short period of time. He thought about 10 to 15 minutes after the robbery. That's probably about right. It could be a little on the short end. All the witnesses were estimating times. Officer Engelbrecht thought that he got to the scene of the potential burglary within like a minute. And he thought the canine unit arrived within about 10 minutes. And that the canine dog -- I didn't put that in the record before -- tracked that path precisely where he had seen the people running. Which I considered for probable cause also. So, 10 minutes seems probably on the short end, perhaps 15 to 20. But that really is a very short period of time after something like an armed robbery.

All the officer said was, this is a possible suspect. Could this possibly be one of the guys? I don't think that the conditions at the time were a problem. The dome light was on. The Defendant has had a braided type hairdo when he has been here too, which the victim found distinctive. He indicated he had seen the Defendant before during his work in a liquor store. I think the words used by the officer along with the victim's contact with the Defendant in the past, along with his opportunity to observe the Defendant, along with the nearness in time would all cause me to conclude that there is, was no problem with that

show-up identification.

There was a lot of factors that bear on suggestiveness or impermissible suggestiveness. I just don't see that they apply in this case. I don't think there were any improper statements made by the officers. The Defendant did have somewhat of a distinct appearance. I understand that the victim was upset. That's certainly understandable under the circumstances. But I don't think it was to the extent that he couldn't make a reliable identification. Certainly, his identification of the Defendant, he can be cross-examined on that if this case goes to trial. And there can be a great deal of argument that the jurors should not give it much weight or credit. But I don't think it is constitutionally defective based on all of the circumstances at the time.

And the same would be true of any identification at the police station. It happened shortly thereafter. Again, I didn't get a lot of information about how the photo identification was performed. It is almost just sort of an afterthought during the evidentiary hearing. But he had already identified the Defendant twice, once in the back of the squad and once through the mirror.

If you want to pursue that later, you can, Mr. Holden, if this case goes to trial. But at this point, I haven't heard anything that would suggest to me that this

single photo display, which is my understanding, just a mug shot of this Defendant, was impermissibly suggestive.

MR. HOLDEN: Thank you.

THE COURT: I think all of the identification is fine at this point. And I do think there was probable cause.

Having said that, what is the word from the crime lab in terms of when we can get their report? Do we know?

MR. HOLDEN: If I may answer. Mr. Hitt indicated he did not know as of when I talked to him earlier today. I don't know if he had a chance to follow up on it this afternoon. Apparently not.

THE COURT: I asked him to, though; didn't I? I thought I did. I thought I said, before we come back here, could someone check when we can get that information so that we know what to do for scheduling. But whatever. So, we don't know anything. What do you propose, Mr. Holden?

MR. HOLDEN: Your Honor, I propose that we set this matter for scheduling in perhaps ten days or two weeks, at which time hopefully we will know.

THE COURT: We are only going to know if somebody calls the crime lab.

MR. HOLDEN: I will be more than willing to do that.

STATE OF WISCONSIN

IN SUPREME COURT

No. 03-1690-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYRONE L. DUBOSE,

Defendant-Appellant-Petitioner.

ON PETITION TO REVIEW A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE BROWN COUNTY CIRCUIT COURT, THE HONORABLE SUE E. BISCHEL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

IN SUPREME COURT

No. 03-1690-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYRONE L. DUBOSE,

Defendant-Appellant-Petitioner.

ON PETITION TO REVIEW A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE BROWN COUNTY CIRCUIT COURT, THE HONORABLE SUE E. BISCHEL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF ISSUES

I. Whether this court should follow the current federal legal standard interpreting the due process clause as it relates to admissibility of showup identifications, or to abandon it as Dubose now urges, when to do so would reverse this court's own precedents holding that the due process clauses of the state and federal constitutions are essentially equivalent and are subject to identical interpretation?

This issue was not before the appellate court which applied the test pronounced in the United States Supreme

Court, and followed by the Wisconsin courts, in determining that the showup procedure in this case was not impermissibly suggestive.

II. Whether this court should create a new rule, as Dubose now urges, that all showups, regardless of the circumstances, are impermissibly suggestive?

This issue was not before the appellate court which applied the United States Supreme Court and Wisconsin test, and held that the showup procedure used in this case was not impermissibly suggestive.

III. Whether this court should create a new rule, as Dubose now urges, that all identifications following an impermissibly suggestive procedure are to be per se excluded, unless they are necessary, regardless of reliability?

This issue was not before the appellate court and the appellate court never reached the reliability issue because it found the showup under current federal and Wisconsin law was not impermissibly suggestive.

IV. Whether this court should modify the current reliability test for pretrial identification evidence, and to create a new rule, as Dubose now urges, requiring the reliability test even for identification evidence following a proper procedure?

This issue was not before the appellate court which never addressed the reliability issue because it found the showup under current federal and Wisconsin law was not impermissibly suggestive.

V. Was the eyewitness identification of Dubose a permissible showup when it occurred within 15 minutes after the armed robbery had occurred, took place within two blocks of the crime location, and that the police

merely told the eyewitness that Dubose could possibly be one of the guys involved in the robbery?

The appellate court answered this question: yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondent State of Wisconsin requests both oral argument and publication.

STATEMENT OF FACTS

In the very early morning hours of January 9, 2002, Timothy Hiltsley and his friend Ryan Boyd left the Camelot Bar in Green Bay, Wisconsin, and ran into some people in the bar's parking lot (65:12-13; 71:81). One of the people Hiltsley encountered in the Camelot parking lot was Dubose whose name Hiltsley did not know at the time, but whom he recognized as a customer at West Side Liquor where Hiltsley had previously worked (65:13, 22; 71:81, 90). After a conversation, Dubose and another man agreed to go to Hiltsley's home at 943 Division Street in Green Bay to smoke some marijuana and play some pool (71:81-82). So Dubose, another man, Hiltsley, and Boyd proceeded to drive to Hiltsley's residence in Hiltsley's Blazer (71:82). Along the way, a brief stop was made as Dubose wanted to pick something up at a house off Broadway Street (71:82). They arrived at Hiltsley's house and Hiltsley entered first advising the group that he had a large dog whom liked to bark and jump up (71:83). Upon hearing this, Dubose asked Hiltsley to put the dog away, and so Hiltsley locked the dog in his bedroom and then everybody went inside the home (71:83).

Hiltsley sat down on his couch with Dubose standing to his right while Boyd had his back to them. Boyd was rolling a cigarette on the end table near the front door, and the other man was sitting on the couch across

from Hiltsley and Dubose (71:84). They were in the house for about five minutes when Dubose pulled out a small, black, semiautomatic pistol, pressed it against Hiltsley's temple, and ordered Hiltsley to give him his "fucking wallet" (65:13; 71:85). Hiltsley pulled out his wallet and gave Dubose all the money in it, which was approximately $280 (65:13; 71:85-86). Dubose and the other man then ran past Boyd and out the front door (65:13; 71:86).

After Dubose and the other man had fled Hiltsley's home, Hiltsley and Boyd ran out of the house and started chasing after them down the sidewalk (65:14; 71:86). At this point, Carla Leisgang who lived at 922 Division Street, right near Hiltsley, called the police complaining of a possible burglary in progress as she had observed two people running out of the house next to hers, and they were running eastbound and that one of the people involved was wearing a large flannel with a hood (71:122-24). The police immediately responded to this call at approximately 1:21 a.m. (71:122).

Meanwhile, Hiltsley continued to chase after Dubose and the other man but as soon as he got behind them running down the sidewalk they cut off into the yards (71:87). At this point Hiltsley got into Boyd's vehicle, and they drove approximately three blocks ahead so that they could cut off Dubose and the other man (71:87). Hiltsley then got out of the car and quickly observed a police squad approaching (71:88). Hiltsley had not yet called the police but they were in the area because they were responding to Carla Leisgang's complaint (71:88, 122). It was only a couple of minutes after the robbery that Hiltsley made contact with the police and told them that he had just got robbed at gunpoint (71:88-89). Hiltsley advised the police that the two men who robbed him were black and that one was about five foot six and the other was a little taller (65:22).

Officer Jeffrey Engelbrecht of the Green Bay Police Department had responded to the original burglary

complaint and made an emergency response in a marked patrol unit (65:35-36). As Engelbrecht started to turn off of Dousman Street and turn onto North Norwood, he saw two people walking eastbound on Division Street, one of whom was wearing a large flannel with a hood (65:36; 71:127). As Engelbrecht turned onto North Norwood Street, the two people started to run in the opposite direction; and Engelbrecht pursued them until they ran into an area between houses and garages (65:37; 71:125, 127). Upon making this observation, Engelbrecht radioed headquarters and advised that he had observed the two possible suspects running from the area (71:128). Engelbrecht also asked for assistance to set up a perimeter within a one-block radius and within a minute and a half the area was cordoned off (71:128). Also Engelbrecht requested that the Brown County Sheriff's Department send their canine unit over to help track the area (71:129). Engelbrecht then received information that there was a possible armed robbery which had just occurred at 943 Division Street and that the suspects were two African American males, one of which was wearing a flannel with a hood and one of the two had a gun (65:39; 71:130). Headquarters also advised that the recent armed robbery complaint was probably related to the original burglary complaint (71:130).

Shortly thereafter, Brown County canine officer Deputy Tim Newtols arrived at the scene with his dog (65:39; 71:129-30). Engelbrecht, Newtols, and the dog immediately began tracking from the point where Engelbrecht had last seen the two suspects run between the two houses (65:39). The canine began tracking immediately eastbound through the backyards until it got into the backyard area of 807 Kellogg Street which was within the perimeter area which had been cordoned off and which was protected by a six-foot high wood fence (65:39-40; 71:131-32). As soon as the dog got to the fenced backyard area of 807 Kellogg, it stopped and began to bark and hold (65:40; 71:132). At this point, Deputy Newtols gave the command for whoever was behind the fence to come out, and Dubose came over the

fence (65:40; 71:132). Engelbrecht directed Dubose to the ground, handcuffed him, and placed him in the back seat of the squad car (65:40-41).

Within ten to fifteen minutes after the robbery, a police squad escorted Hiltsley to the squad where Dubose was located to see if he could make an identification (65:18). Hiltsley had been told that the person he would observe in the squad was a possible suspect who could be possibly one of the guys who had robbed him (65:17). Hiltsley was in the backseat of one police squad when it pulled up to approximately three feet away from the other squad car where Dubose sat alone in the right rear side of the back seat (65:27). There was a domed light on so that Hiltsley could see into the squad where Dubose was seated (65:18-19).

Hiltsley identified Dubose as one of the people who had robbed him and as the person who had pressed the gun against his temple (65:18-19, 27-28; 71:89, 97). Hiltsley was clear that Dubose was the robber who had the gun because there was something unique about Dubose in that he was small with a real slender build and with an easy recognizable hairstyle of tight braids up against the scalp (65:28-29). In identifying Dubose, Hiltsley advised the police that he was 98% sure that Dubose was the man who had robbed him at gunpoint (65:32). After positively identifying Dubose as the armed robber, Dubose was taken away in the squad, and Hiltsley was transported in the squad he was in to the police station (65:19). At the police station, approximately ten to fifteen minutes after the first identification Hiltsley again positively identified Dubose via a two-way mirror (65:19-20, 28). Other than telling Hiltsley that Dubose might possibly be one of the guys who robbed him, the police did nothing to attempt to steer Hiltsley into identifying Dubose (65:17, 20).

Later that early morning at approximately 3:57 a.m. (71:135), Officer Engelbrecht along with Officer Paul Lewis found a small black semiautomatic pistol lying on the ground just a few feet away from the garage at 832

Division Street and right on the route where Engelbrecht had earlier seen the two men run and on the route to where Dubose was apprehended (65:41-42).

ARGUMENT

Introduction

Dubose seeks a new trial because he argues that the showup identification evidence should have been suppressed. Dubose's argument is dependent on a comprehensive attack on current legal precedents from the United States Supreme Court and this court. First, Dubose argues that all showups are per se impermissibly suggestive. Dubose points to no precedent from any state which has adopted this per se rule for showups. Second, Dubose argues that if this court accepts his premise that all showups are impermissibly suggestive, the identifications they produce should only be potentially admissible if the showup was necessary. This second proposed rule for the exclusion of all identifications from impermissibly suggestive procedures unless "necessary," without regard to reliability, runs contra to United States Supreme Court and Wisconsin case law precedents and is an extreme minority position across the country. Dubose points to only New York and Massachusetts who have such a per se rule for exclusion. Nevertheless, neither New York nor Massachusetts has the per se rule that all showups are impermissibly suggestive, which Dubose urges this court to adopt. Third, Dubose seeks changes in the reliability test to include factors such as race. Dubose points to no authority where such specific factors have been added to the reliability test. Finally, Dubose argues that even when the procedure is permissible, it should be put to the reliability test, but points to no authority anywhere which has adopted this position.

The State respectfully submits that Dubose's radical proposals be rejected for a variety of reasons. First, Dubose's proposed new rules necessarily require this court to interpret the due process clause of the

Wisconsin Constitution in a manner different than the interpretation of the federal constitution due process clause. Second, the adoption of a per se rule that all showups are impermissibly suggestive, runs contra to legal precedent and applies a rigid standard to a fluid concept of "suggestiveness" which heretofore has been determined from a totality of the circumstances analysis. Third, the adoption of a per se exclusionary rule for all identifications pursuant to impermissibly suggestive procedures, unless necessary, creates new problems such as defining what is meant by "necessary," excludes reliable evidence, and in effect would remove showups from the investigatory landscape except in the rarest and most unusual of circumstances. Fourth, Dubose's request for new, specific factors to be included in the general reliability test would necessarily open the door for more specific factors resulting in an unwieldy admissibility test interposing factors best handled by cross-examination and expert testimony. Finally, Dubose's request for a new rule requiring even properly obtained identifications to be put to the reliability test has no legal precedent and would create an unfair obstacle to legally obtained evidence.

I. DUBOSE'S NEW PROPOSED RULES AND TESTS FOR SHOWUP IDENTIFICATIONS SHOULD BE REJECTED BECAUSE THEY REQUIRE THIS COURT TO INTERPRET THE DUE PROCESS CLAUSE OF THE WISCONSIN CONSTITUTION DIFFERENTLY THAN THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The State submits that Dubose's proposals conflict with the current federal standard interpreting the due process clause as it relates to the admissibility of pretrial identifications. While it is true, as Dubose asserts, that the Wisconsin Constitution can be interpreted to provide

greater protections than the United States Constitution, *State v. Hansford*, 219 Wis. 2d 226, 242, 580 N.W.2d 171 (1998), it is also true that this court has consistently declined to do so when interpreting the due process clause. *State v. Hezzie R.,* 219 Wis. 2d 848, 891, 580 N.W.2d 660 (1998); *Reginald D. v. State,* 193 Wis. 2d 299, 307, 533 N.W.2d 181 (1995); *State v. Harris*, 2004 WI 64, ¶ 2 n.1, 272 Wis. 2d 80, 680 N.W.2d 737.

A. The current federal standard for the admissibility of pretrial identifications.

Over a ten-year period, 1967-1977, the United States Supreme Court developed its interpretation of the relationship between the due process clause and the admissibility of pretrial identification evidence. The first case which dealt with pretrial identification procedures and the due process clause was *Stovall v. Denno*, 388 U.S. 293 (1967). *Stovall,* had dramatic facts, which colored the opinion. In *Stovall*, a man was stabbed to death in his home. The man's wife had attempted to intervene and was knocked to the floor and stabbed several times by the defendant. The wife survived the attack and was hospitalized for major surgery to save her life. While in the hospital, the defendant, the lone African American in the room, was brought to her handcuffed to a police officer while accompanied by four other police officers. After being asked if the defendant was the man who had killed her husband and attacked her, and after the man was ordered to say a few words for voice identification, the wife made a positive identification. *Stovall*, 388 U.S. at 295.

With these facts, the *Stovall* Court concluded that the identification was admissible because it was not so unnecessarily suggestive and conducive to irreparable, mistaken identification that it denied the defendant due process of law. *Stovall*, 388 U.S. at 302. Significantly, the *Stovall* Court held that a due process violation claim

based on the conduct of an identification confrontation depends on the totality of the circumstances surrounding it. *Id.* It is true that the *Stovall* Court relied heavily on the necessary nature of the confrontation in endorsing it, but the State disagrees with Dubose's reading that *Stovall* makes a distinction between *necessarily* and *unnecessarily* suggestive procedures. (*See* appellant's brief at 12). Rather, the State submits that the necessary nature of the confrontation was one factor, albeit a compelling one, in the totality of the circumstances analysis. *Stovall* is silent as to how it would view a less suggestive showup in circumstances less urgent or dramatic than the one before it. More likely *Stovall* stood for the proposition that the more necessary the confrontation, the more tolerant the court would be of "suggestiveness," leaving open the possibility that less necessary showups would be permissible if the procedure employed was less suggestive. This sliding scale of necessity compared to suggestiveness fits the totality of circumstance test the *Stovall* Court enunciated for due process violation claims. The State submits that *Stovall* stood for the principle that very suggestive showups are more likely to be found permissible if necessary and not for the principle that all less necessary but less suggestive showups violate due process.

In *Simmons v. United States,* 390 U.S. 377 (1968), the Supreme Court again dealt with the admissibility of a pretrial identification, but in this case, it stemmed from a photographic identification and not from a showup. The *Simmons* Court reprised the *Stovall* standard that the key in determining a due process violation is whether the pretrial identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons*, 390 U.S. at 384. The *Simmons* Court, like the *Stovall* Court, employed the totality of circumstances test in deciding whether the challenged procedure was impermissibly suggestive when it wrote, "Instead, we hold that each case must be considered on its own facts." *Id.*

In holding that the photographic identification did not violate the defendant's due process, the Court emphasized the necessity of the procedure, but defined necessity as the need for the police to solve a serious felony as opposed to the *Stovall* necessity, which was linked to the possible unavailability of the eyewitness in the future. The different slant the *Simmons* Court took in defining what is "necessary" reveals the difficulty inherent in making "necessity" the key to admissibility. Moreover, the *Simmons* Court examined reliability factors such as the fact that the robbery took place in a well lighted bank and that the victims had a substantial period of time to view the perpetrator. *Simmons,* 390 U.S. at 385. *Stovall* did not examine the reliability issue, possibly because the necessity was so great, whereas in *Simmons*, where the exigency was less, the Court looked at more factors to pass the totality of the circumstances test. While in *Stovall,* the Court seems to suggest that the more necessary the procedure the more permissible it will be regardless of its suggestiveness; in *Simmons,* the Court seems to suggest that the more reliable the identification the more tolerant it will be of a lack of an exigency. In either case, the Court is looking at the totality of the circumstances. From these cases, one can see the seed from which the eventual, two-pronged test hinging first on suggestiveness and then on reliability was spawned.

In *Foster v. California,* 394 U.S. 440 (1969), the Court found a due process violation because the procedures involved were highly suggestive. In *Foster,* the eyewitness could not make a positive identification during a highly suggestive lineup where the defendant was the only tall man and the only one wearing a leather jacket. The leather jacket is significant because the victim had previously informed the police that the perpetrator was wearing a leather jacket. *Foster,* 394 U.S. at 441. After this highly suggestive lineup failed to produce an identification, the police arranged for the victim to have a one-on-one confrontation with the defendant. Again, the victim could not make a positive identification. *Id.* Finally, a week or so later, the police arranged for a third

identification procedure, a second lineup in which the defendant was the only person who had been in the first lineup. At this time, the victim made a positive identification. *Id.* at 441-42. Not surprisingly, the court found that the identification violated the defendant's due process rights. Indeed, in *Foster,* there was not the exigency that made a suggestive procedure permissible in *Stovall* or the reliability that saved a suggestive procedure in a less exigent situation in *Simmons.*

In *Neil v. Biggers,* 409 U.S. 188 (1972), the analysis of due process and pretrial identification procedures continued to develop. In *Biggers*, a victim was grabbed from behind by the defendant with a butcher knife. *Biggers,* 409 U.S. at 193-94. When the victim screamed, her 12-year-old daughter came out of her bedroom and also screamed. The defendant told the victim to tell her daughter to shut up or he would kill them both. *Biggers,* 409 U.S. at 194. The defendant then walked the defendant away at knife point into the woods where he raped her. *Id.* The victim managed to escape and gave the police a rather general description of the defendant several months after the incident. The victim made a positive identification at a showup which consisted of two detectives walking the defendant past the victim and having the defendant say "shut up or I'll kill you." *Biggers,* 409 U.S. at 195. The police had used a showup procedure instead of a lineup because they claimed they could find no one else resembling the defendant to participate in a lineup. *Id.*

The *Biggers* Court was faced with a new challenge: How to handle an impermissibly suggestive pretrial identification procedure, which was nevertheless reliable. While the *Biggers* Court implicitly held that the identification procedure employed was improper, they also held that a strict rule barring evidence of improper but reliable confrontations was too extreme. *Biggers,* 409 U.S. at 198, 201.

In *Biggers,* for the first time, the Court clearly held that evidence from an improper procedure could still be admissible if it was reliable. *Simmons*, had also looked at reliability but had hedged its bet by finding that the challenged procedure was proper, largely because it was necessary. In examining reliability, *Biggers* crafted five factors to consider. These factors are: 1) the opportunity of the witness to view the defendant at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's prior description of the defendant; 4) the level of certainty demonstrated by the witness at the confrontation; and 5) the length of time between the crime and the confrontation. *Biggers,* 409 U.S. at 199. Applying those factors to the facts of their case, the *Biggers* Court held the evidence was reliable and thus admissible. *Biggers,* 409 U.S. at 201.

Biggers, however, left a question unanswered. The primary problem is that while *Biggers* noted that a rule which would per se exclude evidence from improper procedures might deter the police from improper practices, this concern was irrelevant here since the police actions took place before the decision in *Stovall*, which for the first time held that an impermissible, suggestive procedure could produce inadmissible evidence. *Biggers,* 409 U.S. at 199. So, left open was whether the Court would save evidence from an impermissibly suggestive procedure, if the evidence was reliable, and if the identification took place after *Stovall* had been decided. In *Manson v. Brathwaite,* 432 U.S. 98 (1977), the Court resolved the question left open in *Biggers*, and established what is still today the legal standard for evaluating the admissibility of pretrial identification evidence.

In *Manson*, a state trooper made an undercover buy of drugs from the defendant. The trooper made a positive pretrial identification of the defendant by viewing a photo of the defendant two days after the purchase. *Manson*, 432 U.S. at 100-101. The parties conceded that the photo identification was improperly suggestive. The *Manson* Court was therefore faced with a decision whether to

follow *Biggers'* reliability analysis, or as the case occurred after *Stovall,* to adopt a per se exclusionary rule for identification evidence generated from an impermissibly suggestive procedure. *Manson* rejected the per se rule of exclusion and held that identification evidence from an impermissibly suggestive procedure is still admissible if under the *Biggers* five factors, the evidence is reliable. *Manson*, 432 U.S. at 114. In so holding, the *Manson* Court noted the standard is fairness as required by the due process clause of the United States Constitution and that *Stovall* and *Biggers* had stressed the totality of circumstances and had not either singly or collectively established a strict exclusionary rule or new standard of due process. *Manson,* 432 U.S. at 113.

A summary of the development of the federal law on pretrial identification practices is as follows:

1) *Stovall v. Denno,* which for the first time made pretrial identifications a due process concern and thus violations could result in the inadmissibility of evidence. *Stovall* made clear that the analysis would be the totality of the circumstances and the test would be whether the identification procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall* emphasized that necessity is a key factor in determining whether the procedure was impermissibly suggestive, but was silent as to whether less suggestive procedures would be permissible in less exigent circumstances.

2) *Simmons v. United States,* which followed the *Stovall* totality of circumstances approach and while finding that the procedure utilized was permissible, also looked at reliability factors.

3) *Foster v. California,* which suppressed identification evidence from a highly suggestive and unreliable procedure.

4) *Neil v. Biggers*, which again followed the *Stovall* totality of circumstances approach and held that impermissibly suggestive procedures could still produce admissible evidence if reliable and set forth the five factors to consider in a totality of circumstances test as to reliability. *Biggers* left the door open for a rejection of the reliability test and the adoption of a per se exclusionary rule for identifications from an impermissibly suggestive procedure if the identification occurred in a case after *Stovall* had been decided.

5) *Manson v. Brathwaite*, which held that the *Biggers* reliability test is to be employed in the post-*Stovall* world and specifically rejected the per se rule of exclusion for reliable identification evidence.

B. The current Wisconsin standards for the admissibility of pretrial identification evidence and for interpreting the due process clause.

Wisconsin has closely followed the federal holdings on the issue of the admissibility of pretrial identification evidence. Wisconsin has reprised the key point first enunciated in *Stovall* that a criminal defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure that is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *State v. Wolverton,* 193 Wis. 2d 234, 264, 533 N.W.2d 167 (1995). In *Wolverton*, this court also reiterated the two-tiered test for admissibility: 1) the defendant bears the initial burden of showing that a showup was impermissibly suggestive; and 2) if this burden is met, the State then must show under the totality of the circumstances that the identification was reliable. *Id.* Wisconsin employs the *Biggers* five-factor test in determining the reliability issue. *Wolverton,* 193 Wis. 2d at 264-65.

It is clear that the rules Dubose urges this court to adopt conflict with both the federal law on this issue and this court's previous holding in *Wolverton.* Dubose seeks a per rule that all showups are suggestive. The United States Supreme Court has never made such a holding, and this court specifically rejected such a rule in *Wolverton. See Wolverton,* 193 Wis. 2d at 265. Moreover, the body of United States Supreme Court opinions on the due process-pretrial identification issue has consistently revealed an aversion to adopt per se rules, preferring the totality of the circumstances approach. Dubose seeks a rule of exclusion for all impermissibly suggestive pretrial identifications, unless necessary, without regard to reliability. This runs completely contra to *Manson* and *Wolverton.* Dubose seeks a rule requiring permissible, non-suggestive identifications to be put to the reliability test, which runs contra to the federal law and to *Wolverton.* He also seeks revisions in the *Biggers* five-factor test for reliability.

However, beyond the obvious conflicts between Dubose's proposals and the current state of federal and Wisconsin law is the even more fundamental issue that Dubose is asking this court to interpret the Wisconsin Constitution due process clause differently than the clause has been interpreted in the United States Constitution. The State agrees with Dubose that this court has the authority to do so but takes vigorous exception to Dubose's implicit suggestion that this court has not spoken to the issue as to whether the due process clause in art. 1, § 8 of the Wisconsin Constitution is equivalent to the due process clause in the United States Constitution. (Appellant's brief at 30). In truth, this court has addressed this issue, although on different issues than pretrial identifications. In *Harris*, this court in dealing with the due process issue of non disclosure of pertinent information to a defendant prior to a plea observed in n.1, as follows: "'This court has repeatedly stated that the due process clauses of the state and federal constitutions are essentially equivalent and are subject to identical

interpretation.'" *Harris*, 272 Wis. 2d 80, ¶ 2 n.1 (quoting *Hezzie R.*, 219 Wis. 2d at 891).

In *Hezzie R.*, this court in dealing with the due process issue inherent in denying a juvenile a trial by jury, unequivocally wrote that the due process clauses of the Wisconsin and the United States Constitutions are essentially equivalent and subject to identical interpretation.

Dubose, perhaps sensing the tenuous nature of his request that this court interpret the due process clause differently than the federal interpretation, seeks to shorten the leap by suggesting that the recent United States Supreme Court opinion of *Crawford v. Washington*, 541 U.S. 36 (2004), shows a United States Supreme Court which would be receptive to his new rules. The State finds it difficult to fathom how the court's concern with the admissibility of certain types of evidence at trial, because it is not subject to cross-examination, transfers to a concern about pretrial identification procedures whose identifications, if admissible, would be subjected to cross-examination. Certainly, it is quite a stretch to suggest that the holding in *Crawford* portends that the United States Supreme Court would completely reverse itself in the manner Dubose urges if given the opportunity to do so.

Hence, Dubose is not only asking this court to reverse itself as to its prior holdings on the issue at hand but is also asking this court to reverse itself on its prior holdings that the due process clauses of the Wisconsin Constitution and the United States Constitution are equivalent and subject to identical interpretation. The State respectfully submits that this court decline his invitation.

II. DUBOSE'S PROPOSED PER SE RULE THAT ALL SHOWUPS ARE SUGGESTIVE IS WITHOUT PRECEDENT AND WOULD WRONGLY PLACE A RIGID STRUCTURE TO A FLUID CONCEPT.

For the reasons stated above, the State submits that Dubose's proposed rules be rejected out of hand as they are in complete conflict with federal and Wisconsin case law on this issue. They would require a radical divide between the Wisconsin and the United States Constitutions on the due process issue inherent in pretrial identification procedures. However, if this court chooses to continue its inquiry to the merit and applicability of these proposed rules, the State offers the rest of its argument in opposition to these proposed rules.

Dubose proposes a rule that all showups should be considered per se suggestive and inadmissible unless necessary and reliable. As mentioned above, this new rule is in direct conflict with this court's holding in *Wolverton* when this court wrote:

> Wolverton contends that the two showups in this case were impermissibly suggestive simply because, on both occasions, he was exhibited to witnesses while sitting alone in the back seat of a police car. We disagree. The mere fact that a suspect was sitting in a police car is insufficient to demonstrate that the showup was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons,* 390 U.S. at 384. To hold otherwise would be tantamount to holding that all showups are impermissibly suggestive, which would run counter to our prior decisions stating that showups are not *per se* impermissibly suggestive.

Wolverton, 193 Wis. 2d at 265.

Besides the obvious rejection of a per se rule that showups are impermissible, what is interesting is the

Wolverton language of "impermissibly suggestive." This language correctly incorporates the premise that being suggestive does not necessarily mean being impermissibly suggestive. Indeed, that was the key in *Stovall;* a suggestive procedure is not the evil to be avoided but rather a procedure so suggestive that it violates a defendant's due process. *See State v. Kaelin,* 196 Wis. 2d 1, 12, 538 N.W.2d 538 (Ct. App. 1995), where the court reasoned that all showups have a suggestive component, but that does not make them impermissibly suggestive.

Necessity is linked to suggestiveness but not as Dubose argues, as a precondition to admissibility, but rather as one factor to consider in the suggestiveness calculus. An extremely necessary procedure is less likely to be found to be impermissibly suggestive than is a less necessary one, but this does not preclude the possibility that a necessary procedure is still so suggestive as to be a violation or that an unnecessary procedure done fairly would not be impermissibly suggestive. Dubose uses the term "per se suggestive" but that has no legal meaning under *Wolverton.* The more appropriate term is "per se impermissibly suggestive." This is so because the development of the federal holdings from *Stovall* to *Manson* and echoed in Wisconsin in *Wolverton,* is that the first test the proposed evidence must face is the "suggestiveness" test of which "necessity" is a factor, not a "necessity" test of which "suggestiveness" is a factor.

The State respectfully submits that not all showups are equally suggestive, as Dubose's rule suggests, and that a showup done in the manner here, shortly after the crime was committed, in the vicinity of where the crime was committed, and with the defendant being alone in a well lighted squad and the victim merely being told that the defendant was a possible suspect, is not impermissibly suggestive, be it necessary or not. The State argues that Dubose must have this court endorse a radical per se rule that all showups are impermissibly suggestive because without a per se blanket indictment of the showup

practice, the showup used in this case would be found to be permissible, and not unduly suggestive.

As already argued, Wisconsin courts have previously rejected a per se rule that all showups are impermissibly suggestive. Indeed, Wisconsin courts have shared the United States Supreme Court aversion to any per se rules in a pretrial identification-due process analysis. *See State v. Benton,* 2001 WI App 81, ¶ 5, 243 Wis. 2d 54, 625 N.W.2d 923, where the court rejected a per se rule that a certain type of photographic array was impermissibly suggestive and wrote, "A *per se* approach, however, is contrary to the general rule in Wisconsin that whether an identification procedure is impermissibly suggestive must be decided on a case-by-case basis." *Benton,* 243 Wis. 2d 54, ¶8 *(citing Wolverton,* 193 Wis. 2d at 265). Dubose does not point to any jurisdiction anywhere that has adopted his proposed rule that all showups are per se impermissibly suggestive.

Since *Stovall,* the United States Supreme Court and Wisconsin courts have favored a totality of circumstances approach to the due process issues involved in pretrial identifications and have shied away from per se rules. This makes sense for a determination as to whether a particular procedure is impermissibly suggestive lends itself to a fact based, case-by-case inquiry and not to a rigid mechanical rule.

The State submits that the proposed rule finding that all showups are impermissibly suggestive, runs contra to existing federal and Wisconsin law, appears to be without precedent anywhere, is based on the false premise that all showups are equally suggestive, and applies a rigid mechanical rule to the fluid concept of impermissible suggestiveness. The State respectfully submits that this court reject this proposed rule as it did once before in *Wolverton.*

III. DUBOSE'S PROPOSED RULE THAT IDENTIFICATION EVIDENCE PRODUCED BY AN UNNECESSARILY SUGGESTIVE PROCEDURE IS INADMISSIBLE REGARDLESS OF RELIABILITY CONFLICTS WITH CURRENT FEDERAL AND WISCONSIN LAW AND WOULD DE FACTO ABOLISH THE SHOWUP IDENTIFICATION PROCEDURE.

Dubose proposes a rule that the evidence generated from unnecessarily suggestive pretrial identification procedures be excluded, regardless of reliability. Again, the State is troubled by Dubose's language. The wording "unnecessarily suggestive" seemingly misses the point. Current identification procedures are taken to the reliability test only if they have been shown to be impermissibly suggestive, whether they be necessary or not. For Dubose's rule to make sense, "unnecessarily suggestive" must mean "impermissibly suggestive," just as his per se rule that all showups are "suggestive" must mean that all showups are "impermissibly suggestive." However, this language in combination would mean that Dubose would be asking this court to abolish showups, as under his proposed new rules impermissibly suggestive procedures cannot be saved by the reliability test. Dubose does not go that far, so he hedges his bets by allowing for impermissibly suggestive procedures to produce potentially admissible evidence if they are necessary. The problem with this approach is that Dubose is not only proposing new rules within the current, two-tiered model but is proposing that "suggestiveness" be replaced with "necessity" as the linchpin to the first tier. Such a proposal turns *Stovall* and its progeny on its ear as it would make the due process cornerstone the necessity of the procedure as opposed to its suggestiveness. In other words, Dubose is seeking a new first-tier test: That the State must show that the challenged pretrial identification procedure was necessary, as opposed to the current model

where "necessity" is one of the circumstances to consider in the "suggestiveness" first-tier test.

Semantics aside, Dubose's per se exclusionary rule for evidence that fails the first tier of the current two-tier test, runs contra to federal and Wisconsin law and is the extreme minority position nationwide. Dubose points to only New York and Massachusetts having adopted such a rule. *See Commonwealth v. Johnson,* 420 Mass. 458, 650 N.E.2d 1257 (1995); *People v. Adams,* 53 N.Y.2d 241, 423 N.E. 2d 379 (1981). However, neither New York nor Massachusetts have embraced Dubose's proposed rule that all showups are per se impermissibly suggestive.

Besides having little precedent to support this new rule, Dubose, by making "necessity" the only exception to his exclusionary rule for impermissibly suggestive procedures, places a premium on defining the term, "necessity." Dubose offers little direction in this regard other than to proclaim that whatever value a fresh showup occurring right near the scene and which might quickly exonerate an arrested suspect might have does not make these factors part of the "necessity" equation. Here, Dubose overplays his hand. By arguing first that all showups are impermissible unless necessary, and then removing geographic and temporal proximity from the "necessity" analysis, he, in effect, is saying that geographic and temporal proximity have no redeeming value in a showup. This is strange considering that even New York, one of the two states Dubose points to having the exclusionary rule he now seeks, refers to geographic and temporal proximity as two positive factors in evaluating the propriety of a showup. *See People v. Ortiz,* 90 N.Y.2d 533, 686 N.E.2d 1337 (1997); *People v. Duuvon,* 77 N.Y.2d 541, 543-44, 571 N.E.2d 654 (1991) (holding that showups performed in geographic and temporal proximity to the crime are not presumptively infirm). In Wisconsin, geographic and temporal proximity are also key in evaluating the propriety of a showup. *See State v. Garner,* 207 Wis. 2d 520, 536, 558 N.W.2d 916 (Ct. App. 1996); *State v. DiMaggio,* 49 Wis. 2d 565, 586,

182 N.W.2d 466 (1971). It is perhaps not surprising that Dubose seeks to remove the relevancy of geographic and temporal proximity to the evaluation of the propriety of a showup as both those elements were present in the challenged showup identification in this case.

Dubose only offers the *Stovall* scenario as meeting his definition of "necessity." As discussed earlier, *Stovall* involved the dramatic facts of the eyewitness being in a hospital room struggling for life itself. A distillation of Dubose's proposed rules reads as follows: All showup identification evidence is inadmissible unless the eyewitness is very possibly not able to participate in any other kind of procedure. Short of a severe health crisis, one wonders what else could qualify, or at least what else the police could be aware of at the time. The net effect of Dubose's proposed rule is to render almost all showup identification evidence inadmissible.

To support his request for the extreme minority position that identifications from an impermissibly suggestive procedure be excluded, even if reliable, Dubose argues that an unfairly suggestive procedure actually increases the possibility that the identification passes the reliability test. The logic is that it is unfair to save an identification tainted by an impermissibly suggestive procedure, by a test which the impermissible procedure aids in passing. While at first blush this argument is appealing, it is only persuasive if the *Biggers* reliability factors actually are closely connected to the identification procedure itself. This is not the case. Indeed, the first dominant factor in showing reliability is the opportunity of the witness to view the criminal at the time of the crime. This factor is powerfully linked to reliability and is in no way impacted by the identification procedure itself. The second factor deals with the witness's degree of attention and again is irrelevant to the procedure. The third factor, the accuracy of the witness's prior description of the criminal, again is linked to the witness's conduct prior to the challenged procedure and thus is not impacted by it. Only the fourth factor, the level

of certainty demonstrated at the confrontation, has a nexus with the procedure. The fifth and final factor, the time frame between the crime and the confrontation, actually shows the opposite of Dubose's contention. It is probable that if the procedure is corrupt, the timing and location of the identification were bad, so it is likely that the failing of the first test of impermissible suggestiveness promotes a failure of the fifth reliability factor. In summary, the *Biggers* five reliability factors are sufficiently divorced from the challenged procedure as to make the test a fair one, especially since the test is not a mechanical one but one which is utilized within a totality of the circumstances framework.

The State submits that this court should reject Dubose's proposed rule calling for the automatic exclusion of impermissibly suggestive evidence unless necessary, for the following reasons: 1) it would change the emphasis of the first tier of admissibility from suggestiveness to necessity; 2) it offers little guidance as to what is meant by necessary other than to exclude factors like geographic and temporal proximity to the crime, factors which courts have traditionally embraced in finding procedures permissible; 3) it would virtually eliminate the showup procedure except for in the most unusual of circumstances; and 4) it is based on the erroneous premise that an impermissibly suggestive procedure necessarily facilitates the identification passing the reliability test. Instead, the State respectfully submits that this court adhere to the federal rule and its own precedent, embraced by most of the country, placing evidence which fails the first tier test of suggestiveness to the second tier reliability test before determining admissibility.

IV. DUBOSE'S PROPOSED CHANGES TO THE RELIABILITY TEST ARE NOT NECESSARY.

Dubose seeks to change the *Biggers* reliability test which has been adopted by Wisconsin. As mentioned above under Dubose's proposed rules, the reliability test would only be employed in showups in the rare circumstance that an eyewitness would probably not be able to participate in any other kind of procedure. Otherwise, absent this kind of emergency exception, under Dubose's proposed new rule, showup identifications are to be summarily suppressed without regard to reliability. Having stripped the test of most of its functional utility, Dubose now seeks to make the test tougher.

First, Dubose seeks to add a factor as to whether or not the eyewitness and the subject are of the same race, citing authority for the proposition that people are more accurate in identifying people of their own race. (Appellant's brief at 26, 37). The problem with this is that it is too narrow a factor for a general test, and the issue is incorporated in the Biggers factors dealing with time of observation during the crime, the description, and the confidence the eyewitness has in the identification. Also, it is likely that there are studies, which could show difficulties inherent in identification which cross age lines, gender lines or cultural lines. Indeed, there can be almost an endless list of specific factors one could include in a reliability test, such as whether the perpetrator was armed, where the perpetrator was found in relation to the crime scene, the degree of intoxication of the eyewitness, the medical and mental condition of the eyewitness, et cetera. It would seem that the inclusion of specific factors such as race to the reliability test would open the floodgates to countless more equally pertinent, specific factors, resulting in a lengthy and unwieldy test. The beauty of the *Biggers* test is that it is general enough to allow discussion of specific factors in the evaluation of the five general factors. Moreover, many of the specific factors are best handled through cross-examination or expert testimony.

Also, Dubose asks that the *Biggers* reliability test be supplemented by a judicial review of the identification procedure used so the court could gauge whether and to what extent the procedure contaminated the evidence. (Appellant's brief at 37). Here, Dubose seeks what he has previously objected to; that being a strong link between the first tier of the admissibility test inquiry with the second tier reliability test. If a court pays undue emphasis to the suggestiveness of the procedure in determining reliability, then it is probable that all impermissibly suggestive procedures would fail the reliability test. Moreover, this is not necessary as one of the virtues of the *Biggers* test is that its factors are for the most part quite removed from the actual challenged procedure.

Finally, Dubose goes even farther arguing that even proper non-suggestive procedures be subjected to the reliability test. This completely abandons the two-tier approach of *Manson* and *Wolverton*, which holds that the reliability inquiry is only germane if there is a showing that the challenged procedure was impermissibly suggestive. Indeed, Dubose points to no authority for this proposition.

Dubose justifies his proposed new rules with a lengthy discussion of the science surrounding eyewitness identification. The gist of his discussion is that eyewitness identification is fraught with peril, and only the most careful and well planned of procedures can properly insulate against a false identification. Indeed, one would have to live in a vacuum to not appreciate that eyewitness testimony has in the past resulted in false convictions. Also, the State shares in Dubose's sentiment that a democratic society is more ill served by an innocent man being convicted than by a guilty person walking free. However, whatever the problems inherent in a victim identifying a criminal, it should not be solved by creating onerous obstacles to the admission of pretrial identification evidence. Dubose's rules virtually eliminate the showup procedure and even put more conventional

identification procedures such as photographic arrays and lineups to vigorous scrutiny before being allowed to be presented to a jury, including putting all proper identification procedure identifications to the reliability test.

Dubose references studies and treatises which indict eyewitness identifications. It probably cannot be disputed that the most accurate identifications would come from a series of well orchestrated tests performed in laboratory conditions, which can factor out any possibility for error. While this may be scientifically desirable, it is often not practical in the fluid world of crime and its detection. Also no matter the test, eyewitness identification, unlike more scientific evidence such as DNA, is more prone to error because it involves more of the human element. However, whatever its flaws, it does not seem that the solution is to adopt a series of radical rules, which result in an unfair obstacle course for the admissibility of pretrial identification. This includes the de facto abolishment of showup identifications, and the requirement that even properly obtained identifications be subjected to the reliability test.

An example of the "obstacle course" nature of Dubose's new rules is that it encourages evidence being obtained in the most reliable, scientific manner which typically requires some time frame between the crime and the procedure. This would in effect insure the procedure struggling with the reliability test, as one of the factors for reliability is the length of time between the crime and the detection. Another example, is Dubose's discussion of the negative impact a gun or other violent aspects to a crime might have on a subsequent identification. Undue emphasis on the context of the crime to the reliability of the pretrial identification would seemingly favor identifications from benign crime scenes and prejudice identifications from violent crime scenes.

With science as his primary justification, Dubose asks this court to adopt radical rules which conflict with

federal precedent as well as with its own holdings. A summary of the proposed Dubose rules are as follows:

1) A per se rule that all showups are impermissibly suggestive. This rule is contra to federal and Wisconsin case law, and Dubose points to no authority for such a rule.

2) A per se rule excluding all identification from an impermissibly suggestive procedure, even if reliable. This rule is contra to federal and Wisconsin case law, and Dubose points only to New York and Massachusetts as states which have adopted this minority position. Also Dubose carves out a "necessity" exception to this rule, without much guidance in defining the term, except to reject factors such as geographic and temporal proximity, which heretofore have been keys to finding showups permissible. The "necessity" exception also seems to change the first tier of the test from a "suggestiveness" test to a "necessity" test.

3) A revision of the *Biggers* factors of reliability to include racial considerations, and a core examination of the impermissible procedure. This rule is contra to federal and Wisconsin law, and Dubose points to no authority where such changes have been adopted.

4) A requirement that even identifications from a proper procedure be subject to the reliability test. This rule is contra to federal and Wisconsin law and Dubose points to no authority where such a rule has been adopted.

The State does not wish to undermine the problem of misidentification. Thankfully, progress in modern science has vitiated some of the probative impact of identification as there have emerged new ways to disprove a pointed finger. However, the problems of misidentification are not unique to this generation. Courts have been well aware of it for years. The State submits that the *Manson* approach, reaffirmed most clearly by this court in *Wolverton,* strikes the proper balance between the

criminal's due process rights against procedures geared towards misidentification and society's right to have criminals fairly brought to justice. The beauty of the *Manson* and *Wolverton* approach is that it is geared to a totality of the circumstances approach and thus provides latitude for new perspectives in interpreting whether and how the facts of each case fit into the two-tiered structure.

V. THE SHOWUP PROCEDURE UTILIZED IN THIS CASE WAS PERMISSIBLE UNDER FEDERAL AND WISCONSIN LAW.

The State submits that Dubose needs this court to adopt his rules to suppress the pretrial identification in this case.

First, Dubose needs a per se rule condemning all showups because the first showup in this case was clearly permissible, under the totality of the circumstances test. The showup occurred within ten to fifteen minutes after the armed robbery had occurred and did not take place at the police station but rather at a location of geographic proximity to the offense (65:18, 49). The police did not tell the victim that they had captured the person who had robbed him but merely told the witness that he might possibly be one of the people who robbed him (65:17, 20). The geographic and temporal proximity of the showup in this case has been consistently favored by the courts in the suggestiveness analysis. *See Johnson v. State,* 47 Wis. 2d 13, 18, 176 N.W.2d 332 (1970). "While a show-up may not be an ideal setting for an identification, it is not sufficient alone to establish a due process violation. Indeed, identifications conducted soon after the crime enhance the accuracy of witnesses' identifications and allow innocent suspects to be quickly freed." *Turner v. United States,* 622 A.2d. 667, 672 (D.C. App. 1993) (footnote and citation omitted). The State submits that Dubose needs a per se rule finding all showups

impermissible because the showup utilized in this case was not impermissibly suggestive.

Second, Dubose needs a per se rule for exclusion of impermissibly suggestive identification evidence, in addition to the per se rule condemning showups, because the showup in this case was reliable under the *Biggers* test. The eyewitness had plenty of time to observe Dubose at the parking lot outside of the Camelot Bar (71:81), during the car ride from the bar to the eyewitnesses home (71:82), and for the approximately five minutes in his lighted home before Dubose put a gun to his temple (65:13, 18, 71:83-85). While the eyewitness did not know Dubose by name, he recognized him as a sometimes customer at the liquor store where the eyewitness worked (65:21; 71:90). The eyewitness made the identification within 15 minutes of the criminal incident (65:18). The eyewitness did not hesitate in identifying Dubose and stated that he had noted Dubose's physical characteristics such as his small, very slender build and his hair style of tight braids up against his scalp (65:28).

The State respectfully submits that the showup identification at issue is admissible because it was not impermissibly suggestive. Secondly, even if this court would find that the showup was impermissibly suggestive, it is admissible because it was reliable. The State asks this court to follow well-established federal law, its own holding in *Wolverton* and to affirm the appellate court holding in this case affirming the trial court's denial of the motion to suppress, because the showup procedure in this case was not impermissibly suggestive.

CONCLUSION

For the foregoing reasons, Dubose's judgment of conviction, the trial court's denial of his motions to

suppress, and the appellate courts affirmance of the trial court, should be affirmed.

Dated this 5th day of January, 2005.

Respectfully submitted,

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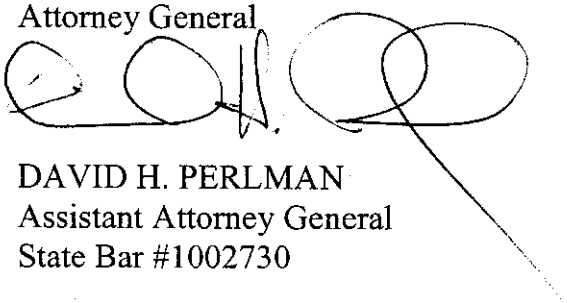

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,040 words.

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 03-1690-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYRONE L. DUBOSE,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN BROWN COUNTY CIRCUIT COURT, JUDGE SUE E. BISCHEL, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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STATE OF WISCONSIN

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v.

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ON PETITION TO REVIEW A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN BROWN COUNTY CIRCUIT COURT, JUDGE SUE E. BISCHEL, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

ARGUMENT

IDENTIFICATION TESTIMONY CONCERNING AND BASED ON A SHOWUP SHOULD BE *PER SE* INADMISSIBLE UNLESS THE STATE PROVES THAT THE SHOWUP WAS NECESSARY AND THAT THE RESULTING IDENTIFICATION IS RELIABLE.

The state and Dubose agree "that a democratic society is more ill served by an innocent man being convicted than by a guilty person walking free" (state's brief at 26). The state also recognizes that "eyewitness testimony has in the past resulted in false convictions" (*id.*) and that courts have been aware of this problem for years (*id.* at 28). Thus, the state says that it does not wish to minimize the problem of eyewitness misidentification, and notes that "progress in modern science has vitiated some of the probative impact of identification [evidence] as there have emerged new ways to disprove a pointed finger" (*id.*)

But while the state acknowledges that the problem of misidentification persists, the state's solution is to do nothing to fix the rules meant to prevent the problem. The state's argument ignores that scientific progress has not only "vitiated" some of the impact of the evidence; it has obliterated the assumptions and logic of the current test. The state acknowledges the developments outlined in Dubose's brief-in-chief (at 18-29) only in passing (state's brief at 26-27) and instead turns a blind eye by asking this court to leave the status quo intact. This court should reject the state's do-nothing approach.

A. This court has the power to establish a new standard for the admission of eyewitness evidence because the current standard is unsound.

The primary reason that the state gives for keeping the current test for admitting eyewitness evidence is that Dubose's proposal "conflicts with" or is "contra to" existing Wisconsin and federal precedent (state's brief at 16, 18, 20, 28). The state is particularly opposed to adopting Dubose's proposal based on a broader interpretation of Wisconsin's due process clause; instead the state says, this court should adhere to the interpretation of due process under the federal constitution, which in turn would require adherence to

U.S. Supreme Court precedent on the matter of eyewitness evidence (state's brief at 16-17).

First, as to the conflict with Wisconsin cases, Dubose does not deny that he is asking this court to depart from precedent on this issue in this court and the court of appeals. This court has said that it follows the doctrine of *stare decisis* scrupulously because doing so is fundamental to the rule of law. ***Johnson Controls v. Employers Insurance of Wausau***, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 205. This in turn means that "[a] court's decision to depart from precedent is not to be made casually" or "without sufficient justification." ***Id.***, *quoting* ***State v. Stevens***, 181 Wis. 2d 410, 442, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring).

But there are circumstances in which this court "should not be barred from pursuing a sound and prudent course for the sake of upholding its prior precedent." ***Id.***, ¶ 96. *Stare decisis* is not a mechanical formula for adherence to prior decisions; nor is it a straightjacket or an immutable rule. ***Id.***, ¶¶ 96, 100. It is "a principle of policy, not an inexorable command." ***Id.***, ¶ 96. Thus, "the power of the court to repudiate its prior rulings is unquestioned, though not often exercised." ***Id.***, ¶ 96, *quoting* ***Schwanke v. Garlt***, 219 Wis. 367, 371, 263 N.W. 176 (1935).

There are several criteria for departing from precedent. These include a need to make a decision correspond to newly ascertained facts, a showing that the precedent has become detrimental to coherence and consistency in the law, or a conclusion that the precedent is unsound in principle. ***Johnson Controls***, 2003 WI 108, ¶ 98-99; ***Stevens***, 181 Wis. 2d at 442 (Abrahamson, J., concurring).

As argued in Dubose's brief-in-chief (at 7-9), developments in both law and science show the need to depart from the precedent governing the admission of

showup evidence. The current test as established in the precedent does not do what it is supposed to do—keep out unreliable eyewitness identification evidence—as has been starkly demonstrated by a long series of cases in which DNA evidence has exonerated innocent prisoners. The standard for admissibility must be changed to correspond with these facts, and a test that does not do what it is supposed to—and may even help assure unreliable evidence—is surely "unsound in principle" and in need of change.

Dubose's rule would put Wisconsin in the vanguard of states on this issue. But as this court recently stated, it "has no apprehension about being a solitary beacon in the law if our position is based on a sound application of this state's jurisprudence." ***Johnson Controls***, 2003 WI 108, ¶ 100. Indeed, the court recognized, "[w]e do more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision. ***Id.*** Thus, the doctrine of *stare decisis* should not be used to permanently enshrine a rule of law that does not prevent—and even makes more likely—wrongful convictions, isolating the rule forever from review and reconsideration.

As to the state's insistence that this court march in step with federal precedent, Dubose acknowledges that this court usually conforms the interpretation of the state constitution to the interpretation of similar federal constitutional provisions. But like *stare decisis*, this doctrinal approach must not make the law into a dead-end street. This court has said it "will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." ***State v. Doe***, 78 Wis. 2d 161, 172, 254 N.W.2d 210 (1977). One of the circumstances justifying an independent court is when this court is convinced that

the federal interpretation undermines the constitutional protections involved. *See* ***State v. Fry***, 131 Wis. 2d 153, 174, 388 N.W.2d 565 (1986). That conclusion "would necessitate that [this court] require greater protection to be afforded under the state constitution than is recognized under the [federal constitution]." ***Id.*** (discussing search and seizure provisions).

Again, developments in both law and science show that adhering to the federal precedent comes with a high cost of wrongful convictions. That high cost accrues not just to the wrongfully convicted, but also to the public at large, sometimes because the actual perpetrator remains on the street, committing further crimes and creating new victims. Like the citizens of Massachusetts, New York and Utah, whose state courts have established more stringent rules under their state constitutions, Wisconsin citizens deserve greater protection than the federal rule supplies. *See* ***State v. Johnson***, 420 Mass. 458, 650 N.E.2d 1257, 1261 (1995); ***State v. Adams***, 53 N.Y.2d 241, 440 N.Y.S.2d 902, 423 N.E.2d 379, 383-84 (1981); ***State v. Ramirez***, 817 P.2d 774, 780 (Utah 1991).

Finally, as Dubose pointed out (brief-in-chief at 32-33), instead of invoking the state constitution this court could adopt his proposal as an exercise of its superintending authority. The state does not mention this alternative basis for adopting Dubose's proposal and thus apparently does not disagree that the court's superintending authority could be invoked in this case.

B. Dubose's proposed rule is appropriate for the goal of excluding mistaken identification evidence.

Apart from its objection to departing from precedent, the state objects to Dubose's proposal on the grounds that the proposal is without precedent, is too rigid and would "abolish" showups, and creates too much of an "obstacle course" for the real world. The state's objections should be rejected.

As to Dubose's proposal being "without precedent" (state's brief at 18-20), while the proposal does depart from the one established in the *current* case law it is not without precedent. The heart of the proposal is that evidence from an unnecessarily suggestive identification procedure should not be subjected to some further reliability test but should simply be inadmissible. This was the test applied in ***Foster v. California***, 394 U.S. 440 (1969), which excluded evidence of a lineup that was suggestive without applying a reliability test. Further, as Dubose noted (brief-in-chief at 34) and the state concedes (brief at 22), both Massachusetts and New York have held that evidence derived from unnecessarily suggestive identification procedures is to be excluded. ***Johnson***, 420 Mass. 458, 650 N.E.2d 1257; ***Adams***, 53 N.Y.2d 241, 440 N.Y.S.2d 902, 423 N.E.2d 379.

The state's objections to the proposal that showups be considered *per se* suggestive are based in part on an apparent misapprehension of the proposal. It objects that what Dubose must really mean is that showups are *per se impermissibly* suggestive because the current test requires proof of impermissible suggestiveness (brief at 18-19, 21). It goes on to conflate impermissible suggestiveness as also meaning unnecessary suggestiveness which, under the proposal, would simply abolish showups (brief at 21).

The proposal's reference to unnecessarily as opposed to *impermissibly* suggestive procedures is deliberate. While the *current* test refers to impermissible suggestiveness, Dubose is seeking to change that test. It is notable that earlier cases did not refer to impermissible (or undue) suggestiveness, but to unnecessary suggestiveness. ***Stovall v. Denno***, 388 U.S. 293, 302 (1967); ***Fells v. State***, 65 Wis. 2d 525, 537, 233 N.W.2d 507 (1974). Some courts use both. *See, e.g.*, ***Rodriquez v. Young***, 906 F.2d 1153, 1161, 1162 (7th Cir. 1990). It has not been especially clear what suggestiveness means, or when it reaches a level that tips the balance against the procedure. ***Rodriquez***, 906 F.2d at 1162 n.6. *See also* Benjamin E. Rosenberg, ***Rethinking the Right to Due Process in Connection With Pretrial Identification Procedures: An Analysis and a Proposal***, 79 Ky. L. J. 259, 298-303 (1991).

Rather than focusing on the point at which a procedure has become so suggestive that it must be subjected to a reliability analysis, the standard should aim to eliminate or at least minimize *any* suggestiveness. The research has identified the ways in which identification procedures create suggestiveness and reasonable and easy methods for avoiding it. Given the availability of those methods in most situations, and the high cost of mistaken identifications because of suggestive procedures, the test should maximize the incentive to use those methods. It will do that by condemning *unnecessarily* suggestive procedures—that is, the use of suggestive procedures when a proper procedure could have been used instead. As the Supreme Court has said, "[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." ***Neil v. Biggers***, 409 U.S. 188, 198 (1972).

Dubose does propose a standard that considers showups to be *per se* suggestive, which would in turn

require the state to demonstrate that use of the showup was necessary. The state (brief at 19-20) objects to this *per se* rule because not all showups are equally suggestive and because it eliminates case-by-case analysis of the procedure. But gradations of suggestiveness matter only when the test requires an unduly or impermissibly suggestive procedure. Dubose's point is that the inherently high suggestiveness of showups—long recognized by the courts and indisputably shown by the research—must be avoided absent exigent circumstances because the unnecessary suggestiveness creates profound unfairness to a defendant by gratuitously creating unreliable evidence. *Cf.* Rosenberg, ***Rethinking the Right to Due Process*** at 291-92. Further, allowing the admission of evidence from a necessary showup still allows a case-by-case analysis of whether the exigency of the circumstances justified the use of the showup.

As to the test of what exigent circumstances will justify use of a showup, Dubose acknowledges that beyond the clear example in ***Stovall*** this issue will have to be subject to further development. But contrary to the state's assertions, this will not abolish showups, for the concept of exigent circumstances is a familiar one to the courts from other contexts in which they balance fundamental rights with the need for prompt action. The state criticizes Dubose for arguing that temporal and geographic proximity do not create exigency, while other courts—for instance, in New York—have said otherwise (state's brief at 22-23). Dubose argued in his brief-in-chief (at 35-36) why the usual justifications for temporal and geographic factors alone are not compelling. Further, making nearness in time and place to the offense alone into an exigent circumstance essentially elevates convenience over proper procedure and undermines the goal of eliminating suggestive procedures.

Finally, the state criticizes Dubose's proposals concerning the reliability test for eyewitness identification evidence. First, it criticizes as erecting an "obstacle

course" (brief at 27) the requirement that identification evidence from either nonsuggestive procedures or *necessarily* suggestive procedures be subjected to a reliability test. It is here that the state finally confronts the scientific developments outlined by Dubose (brief-in chief at 18-29), which support his proposal. Instead of addressing the substance of the developments, the state's response is to say that while "well orchestrated tests performed in laboratory conditions" might be "scientifically desirable, it is often not practical in the fluid world of crime and its detection" (brief at 27).

Having acknowledged the existence of wrongful convictions, and having failed to address let alone rebut the research showing how the current identification regime allows those convictions, the state suggests nothing to address the problem. Its solution is to leave the current broken standard in place because of the perceived impracticality of reform. Yet other jurisdictions have not hidden behind the claim that better procedures cannot be implemented. To name two significant jurisdictions, New Jersey and North Carolina have adopted guidelines developed by the National Institute of Justice's technical working group that created ***Eyewitness Evidence: A Guide for Law Enforcement*** (1999). *See* Winn S. Collins, ***Improving Eyewitness Evidence Collection***, 2003 Wis. L. Rev. 529, 565; Matthew Eisley, ***North Carolina Looks at Its Lineups***, Nat'l L. J., Sept. 29, 2003, at 5. As one of the police officers on the working group has written, the working group's recommendations "are very reasonable and easy to implement. More importantly, they are procedurally sound and will strengthen any investigation and lessen the potential for mistaken identification." Ken Patenaude, ***Improving Eyewitness Identification***, Law Enforcement Technology, Oct. 2003, at 178, 180. *See also* Gary L. Wells, *et al.*, ***From the Lab to the Police Station: A Successful Application of Eyewitness Research***, Am. Psychol. 581, 591 (June 2000) ("The police [in the

working group] had direct experience with eyewitness errors, they read and understood the eyewitness literature, they were motivated to get the actual perpetrator and not be misled to pursue the innocent, and they were receptive to a set of procedural guidelines that would reduce criticism of their methods for collecting eyewitness evidence."). To say the research cannot be applied in the real world is no argument at all. Dubose's proposed new rule both gives law enforcement the incentive to implement better procedures and courts the tools to measure whether the procedures are better.

The second criticism that the state levels at Dubose's proposal concerning the reliability test is that it is not necessary to change the factors in the test. Instead, the state says, the "beauty" of the current test is that it is general enough to allow discussion of specific factors as part of the five general factors (state's brief at 25). Adding more factors will, the state says, "open the floodgates" to many factors and make the test "lengthy and unwieldy" (*id.*). The state does not—indeed, can not—claim that the research shows the test is sound as it currently stands.

Adherence to the current reliability test in the face of the widespread acknowledgement of its problems can only be justified by taking a head-in-the-sand attitude toward 30 years of research and a decade of DNA exonerations. In fact, the failure to come to terms with the research is evidenced by the state's response to Dubose's argument (brief-in-chief at 27-28) that the suggestiveness of the identification procedure itself makes it *more* likely the identification will pass the reliability prong of the test. The state claims (brief at 23-24) that the factors have little or no connection to the identification procedure and therefore can not be affected by it. But this is true of only one of the factors—the time elapsed between the crime and the identification. On all of the other factors, the state's argument ignores the fact that these factors are all based on the witness's self-reports, and that those self-

reports are distorted by a suggestive identification procedure (appellant's brief-in-chief at 27-29).

The state also argues (brief at 26) that Dubose is wrong to ask a court to review whether the identification procedure contaminated the eyewitness evidence. But that is exactly what the current test requires: "Against these [five reliability] factors is to be weighed the corrupting effect of the suggestive identification itself." ***Manson v. Brathwaite***, 432 U.S. 98, 114 (1977). The state is wrong to say that the factors in the reliability test "are for the most part quite removed from the actual challenged procedure" (brief at 26). The fact that they are not removed shows precisely why suggestive procedures should be viewed with deep skepticism and why the proper standard for admitting eyewitness identification evidence should provide every incentive for police to avoid using suggestive procedures and courts to avoid admitting evidence based on those procedures. Dubose's standard does that, and this court should adopt it.

CONCLUSION

For the reasons given above and in Dubose's brief-in-chief, this court should hold that showups are *per se* impermissibly suggestive and that evidence derived from showups is to be excluded unless the showup was necessary under the circumstances of the case. Because the showups in this case were not necessary, the showup evidence should have been suppressed, and Tyrone Dubose is entitled to new trial at which that evidence may not be introduced.

Date this 21st day of January, 2005.

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per full line of body text. The text is 13 point type and the length of the brief is 2,983 words.

Dated this 21st day of January, 2005.

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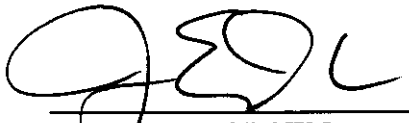

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CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
IN SUPREME COURT
Case No. 03-1690-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

TYRONE L. DUBOSE,
Defendant-Appellant-Petitioner.

NON-PARTY BRIEF OF THE WISCONSIN INNOCENCE PROJECT OF THE FRANK J. REMINGTON CENTER, UNIVERSITY OF WISCONSIN LAW SCHOOL

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INTRODUCTION

Every study to date has demonstrated that eyewitness error is the leading cause of wrongful convictions. In the first study of postconviction DNA exonerations, the U.S. Department of Justice examined 28 cases and found that every one involved eyewitness error. U.S. Dep't of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial* 15 (1996). A subsequent study of the first 67 DNA exoneration cases revealed that 84% involved eyewitness error. Scheck, Neufeld & Dwyer, ACTUAL INNOCENCE 246 (2000). Many involved show-ups. Benjamin N. Cardozo School of Law, *The Innocence Project, at* www.innocenceproject.org/causes/mistakenid.php. Another study of 328 wrongful convictions between 1989 & 2003 found that 64% involved eyewitness misidentification. Samuel Gross, et al., "Exonerations in the United States: 1989-2003," *available at* http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf.

The pattern holds in Wisconsin. At least four Wisconsin men—Steven Avery, Eugene Glenn, Anthony Hicks, and Francis Philip Hemauer—have been convicted based on eyewitness evidence and later released based on evidence of innocence. See Wisconsin Innocence Project, *Wrongful Convictions in Wisconsin, at* http://www.law.wisc.edu/FJR/innocence/wrongconvwisc.pdf. No doubt many more, whose innocence has not been exposed, have similarly been misidentified.

Courts have long recognized the fallibility of eyewitness testimony. Recently, scientific research has

contributed significantly to our understanding of how eyewitness identification works, how it can go wrong, and what can be done to improve it. Unfortunately, the judicial response has been ineffectual, because the standards adopted by the U.S. Supreme Court fail to reflect the scientific research. Furthermore, the standards fail to incorporate appropriate incentives for conducting identification procedures that minimize the risks of misidentification.

Indeed, the current due process analysis has been an utter failure at distinguishing fair and reliable identifications from improperly produced and unreliable identifications. In most of the wrongful convictions in which witnesses misidentified innocent persons, courts applying the governing due process standard rejected challenges to the admissibility of the identification.

In Steven Avery's case, for example, in which a single eyewitness's misidentification led to 18 years of wrongful imprisonment, the court of appeals held that, under prevailing standards, the identification procedure was not impermissibly suggestive. ***State v. Avery***, No. 86-1831-CR, Slip op., 1987 WL 267394 at ***5 (Ct. App. 1986)(unpublished opinion). Avery claimed that the identification was improper for a variety of reasons: a sheriff told the witness prior to viewing the photo array that "there was a chance that the suspect might be in there and that she should look at them and attempt to determine if in fact he was"; Avery was the only person presented to the witness both in a photo array and subsequent live-person lineup; Avery was the youngest, fairest and shortest person in the lineup and the only one with straight hair; other participants in the lineup were well-dressed; and one participant turned toward him during most of the lineup. *Id.* Despite the profound suggestiveness of

these procedures (and now, with hindsight, the knowledge that the procedure did indeed lead the witness to select an innocent man), the court of appeals ruled that "the photo array constitutes one of the fairest ones this court has seen." *Id.*

Because current admissibility standards ignore scientific research and produce an unacceptable risk of wrongful convictions, it is time to adopt a new standard in Wisconsin.[1] We propose a standard that, like the standard proposed by Dubose, focuses primarily on the suggestiveness of an identification procedure, because that is a factor that can be assessed by courts and controlled by law enforcement. However, we believe that it is impossible to create a workable standard in which courts purport to determine the reliability of an identification procedure. Hence, we propose that the current two-pronged standard be simplified to one prong: Was the identification procedure unnecessarily suggestive? If so, the identification must be suppressed. This is the standard adopted in Massachusetts and New York. *See* ***Commonwealth v. Johnson***, 650 N.E.2d 1257, 1260 (Mass. 1995); ***People v. Adams***, 423 N.E.2d 379 (NY 1981).

We depart from the standard proposed by Dubose in that we do not believe courts, beyond assessing unnecessary suggestiveness, can also engage profitably in analysis of an identification's reliability. In cases where there is no unnecessary suggestiveness, the reliability inquiry is best left to juries, aided by expert testimony and scientifically informed jury instructions. The court's goal, rather than guessing about reliability, should be to ensure that

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[1] We agree with Dubose that the Court should do so either under the Due Process clause of the Wisconsin Constitution or under the Court's superintending authority.

identification evidence is free of contamination from unnecessary suggestiveness.

This standard does not render show-ups *per se* inadmissible. Rather, it recognizes that show-ups can sometimes produce significant benefits. But it confines show-ups to those circumstances where they are necessary and conducted in as fair a manner as possible.

ARGUMENT

SHOW-UP IDENTIFICATION EVIDENCE SHOULD BE INADMISSIBLE IF IT IS COLLECTED USING "UNNECESSARILY SUGGESTIVE" PROCEDURES, AND THE RELIABILITY PRONG SHOULD BE ELIMINATED.

A. Jurors tend to misjudge eyewitness accuracy and traditional safeguards are insufficient to counteract this tendency.

A rule of admissibility is necessary to guard against unreliable eyewitness evidence. People generally over-estimate eyewitness accuracy and fail to understand the factors that affect it. Gary Wells & Elizabeth Olson, "Eyewitness Testimony," 54 *Annual Rev. of Psych.* 277, 284-85 (2003)(hereinafter Wells, "Eyewitness"). Unfortunately, expert testimony, cross-examination, and jury instructions are unlikely to be effective safeguards. Expert testimony is not routinely admitted. J.C. Bucci, "Revisiting Expert Testimony on the Reliability of Eyewitness Identification," 7 *Suffolk J. Trial & App. Adv.* 1 (2002). Cross-examination generally fails to increase jurors' sensitivity to the factors that affect eyewitness accuracy. Michael Leippe, "The Case for Expert

Testimony about Eyewitness Memory," 1 *Psych. Pub. Pol. and L.* 909, 923-925 (1995). Finally, the most commonly used jury instruction on eyewitness evidence, adapted from ***United States v. Telfaire***, actually reinforces misconceptions about eyewitness evidence. 469 F.2d 552, 558 (D.C. Cir. 1972) *See* discussion about misconceptions in section B, *infra* .

Moreover, these measures for testing the reliability of an identification at trial all come too late—after the misidentification has already been made. They merely attempt to mitigate the damage caused by a suggestive identification procedure. For a system designed to discover the truth, the goal ought to be to prevent the misidentification before it happens, by creating incentives for utilizing procedures that have the best chance of obtaining a reliable identification. A rule that suppresses identifications produced by *unnecessarily* suggestive procedures produces those incentives.

B. Admissibility should turn on whether an identification was the product of an unnecessarily suggestive procedure.

Researchers have explained that eyewitness evidence is similar to other kinds of trace evidence in that collection procedures affect the reliability of the evidence. Gary Wells, et al., "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads," 22 *L. & Hum. Behav.* 14, 24 (1998)(hereinafter Wells, "Recommendations"). Suggestive collection methods can contaminate this form of "trace" evidence, and produce mistaken identifications.

To address the problem of suggestive identification

procedures, the Supreme Court initially created an admissibility standard in ***Stovall v. Denno*** that considered whether a pretrial identification procedure "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law." 388 U.S. 293, 302 (1967). That standard simply and reasonably required analysis of whether police unnecessarily injected suggestiveness into the identification procedure. Subsequently, the court modified the standard to examine, first, whether the identification procedure was "*impermissibly* suggestive," and, if so, whether the identification was nonetheless sufficiently reliable to be admitted. ***Neil v. Biggers***, 409 U.S. 188, 199 (1972); ***Manson v. Brathwaite***, 432 U.S. 98 (1977).

By shifting from an inquiry into *unnecessary* suggestiveness to a vaguer inquiry into *impermissible* suggestiveness, and then forgiving even impermissible suggestiveness if the identification was nonetheless reliable, the Court moved from a test that evaluates the fairness of the process to a test that purports to gauge the reliability of the identification itself. But that analysis was doomed from the outset, in part because, as the history of wrongful convictions has demonstrated, courts simply cannot distinguish between reliable and unreliable identifications, and because the factors prescribed by the Supreme Court for evaluating reliability are not in fact correlated to reliability.

Under the current reliability test, trial courts consider the witness's confidence as one factor in determining admissibility. But a witness's certainty or confidence bears little relationship to reliability. Wells, "Recommendations" at 14-21. Any relationship that might exist is destroyed when suggestiveness is introduced into the identification procedure,

because confidence levels can be dramatically inflated by suggestive feedback. Gary Wells & A.L. Bradfield, "'Good, You Identified the Suspect': Feedback to Eyewitnesses Distorts their Reports of the Witnessing Experience," 83 *J. of Applied Psych.* 360, 360-76 (1998)(hereinafter Wells, "Feedback"). Even worse, confidence inflation after feedback is most dramatic for eyewitnesses who have made a false identification. Gary Wells, et al., "The Damaging Effect of Confirming Feedback on the Relation between Eyewitness Certainty and Identification Accuracy," 87 *J. of App. Psych.* 112-20 (2002).

Most of the other factors in the ***Brathwaite*** analysis are similarly distorted by suggestiveness: a witness's assessment of her opportunity to view the suspect, her assessment of her attentiveness, and even sometimes her description of the perpetrator, can be influenced by suggestive feedback. Wells, "Feedback" at 360-76. The result is that, in suggestive identification cases, the identification will almost always be deemed sufficiently reliable to overcome the suggestiveness, because the suggestiveness itself distorts the witness's perception of the ***Brathwaite*** reliability factors. Wells, "Recommendations" at 24.

Although social science research has identified other factors that are more closely linked to reliability than those in the ***Brathwaite*** test, no other test can be constructed that adequately measures reliability of any given identification. The factors are too complex, and too variable from one situation and witness to the next. *See* Benjamin Rosenberg, "Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and Proposal," 79 *Ky.L.J.* 259, 280 (1991). They are the types of assessments better left, as are most assessments of truth, to a

jury with the benefit of expert witnesses and scientifically informed jury instructions.

C. Unnecessary suggestiveness can be assessed objectively on the basis of factors identified in the social science research.

What courts can evaluate, with the benefit of the scientific research, and what they can address to improve the accuracy of eyewitness identification evidence, is the unnecessary suggestiveness of procedures used by police to obtain an identification. The objective, scientifically based factors that can be employed to assess the unnecessary suggestiveness of an identification procedure are readily accessible in the psychological literature, as well as in guidelines adopted by, among others, the U.S. Department of Justice,[2] state attorneys general,[3] various police departments, and Wisconsin's Avery Task Force.[4] Those criteria, which courts can and should consider, include the following.

1. Show-ups should be limited to those circumstances where they are necessary.

Research shows that, compared to properly conducted lineups and photo arrays, show-ups are more likely to yield false identifications. Wells, *Recommendations* at 24. Therefore, properly conducted lineups and photo arrays

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[2] U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999).

[3] *E.g.*, New Jersey Attorney General's Eyewitness Guidelines, *available at* www.psychology.iastate.edu/faculty/gwells/njguidelines.pdf.

[4] Avery Task Force, *Eyewitness Identification Procedure Recommendations*, available at http://www.law.wisc.edu/FJR/innocence/EyewitnessGuidelines.htm.

should generally be favored over show-ups.

This does not mean, however, that show-ups should be *per se* inadmissible; there are times when show-ups are necessary and appropriate. For example, where police apprehend a suspect shortly after a crime but lack probable cause to detain the person for a lineup or photo array, a show-up may be necessary to prevent escape of a possibly guilty person.

Conducting a show-up in such circumstances also has benefits for innocent suspects. An innocent suspect who is excluded by a show-up avoids the indignity of further investigation by the police.

Given these considerations, the following test should guide the admissibility of show-up evidence:

> Show-up identification evidence is inadmissible unless officers lacked probable cause to make an arrest and, for that reason or because of other exigent circumstances, they could not have conducted a lineup or photo array.

As a corollary, after one show-up results in an identification, other witnesses to the crime should be shown a lineup or photo array rather than a show-up, unless these subsequent witnesses would be unavailable to view a lineup. This is so because the identification from the first show-up gives rise to probable cause and erases any possibility that the suspect would have to be released if not for another show-up.

2. When necessary, show-ups should be conducted in as non-suggestive a manner as possible.

When a show-up is necessary, special care must be taken to minimize the inherent suggestiveness of the

procedure. Accordingly, show-ups should not be conducted at police stations or other law enforcement buildings, where the message conveyed to the witness is that the person is in custody, and hence likely guilty. If a suspect is detained at the police station, a proper lineup or photo array is possible and public safety would not demand a show-up. Likewise, to prevent unnecessary suggestiveness, suspects outside the stationhouse should not be presented in handcuffs or confined in squad cars, to the extent permitted by public and officer safety.

In Dubose's case, police unnecessarily introduced suggestiveness in the already suggestive show-up procedure by displaying Dubose first while confined in the squad car, and then subsequently while detained at the police station. Such suggestiveness was unnecessary, and irreparably tainted the reliability of the identification.

3. Witnesses must be instructed appropriately.

Any time an eyewitness identification procedure is conducted, the eyewitness should first be told that the real perpetrator might or might not be present and that the investigation will continue whether or not the witness makes an identification. Although this might seem to require stating the obvious, studies show that giving the instruction can reduce mistaken identification rates by as much as 41.6% without affecting the rate of accurate identifications. Wells, "Eyewitness" at 286-87. Without such an instruction, witnesses tend to assume the suspect must be present, and strive to pick someone, even if the actual perpetrator is not present. *Id.* Such an instruction is simple, cost-free, and takes almost no time.

Unfortunately, in Dubose's case, the Court of Appeals

reached the opposite conclusion, stating: "We see nothing wrong with a police procedure where officers indicate an individual is a possible suspect." 2004 WI App. 88, ¶33. This conclusion turns the science on its head. Not only did the officers in this case fail to give a non-biased instruction, they gave a biased, suggestive instruction that effectively asked the witness to simply give the police confirmation of what they already knew. This instruction alone created significant and wholly *unnecessary* suggestiveness that tainted the identification procedure.

4. No suspect should ever be shown to a witness more than once.

In this case, as in Steven Avery's case, police presented Dubose to the witness in more than one identification procedure. Multiple identification procedures, in which the same suspect is presented to the same witness more than once, should never be used. Each viewing of a suspect unalterably changes a witness's memory of the suspect, and reinforces the notion that the person she has seen on each repeated showing was the perpetrator. Doing so taints any identification, and does so unnecessarily.

5. For non-show-up identifications, double-blind sequential photo array and lineup procedures should be used whenever possible.[5]

For reasons too complex to explain within the word limitations of this brief, lineups and photo arrays should be

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[5] The double-blind sequential procedure applies to photo arrays and lineups, not show-ups. This factor is presented here simply to describe fully the identification standard proposed in this brief.

conducted using a double-blind, sequential procedure, whenever possible. The "double-blind" procedure simply refers to the principle that, to avoid even unintentional taint, the person administering the lineup should not know which person is the suspect.

The sequential procedure draws upon social science demonstrating that showing photographs or individuals to a witness sequentially, rather than simultaneously, significantly reduces the rate of false positives by minimizing the tendency for witnesses to compare individuals in a lineup and pick the one—even when no one in the lineup is the true perpetrator—who looks most like their memory of the perpetrator.

For a description of these procedures and the underlying science, see Wells, "Eyewitness" at 288-90; Avery Task Force at http://www.law.wisc.edu/FJR/innocence/EyewitnessGuidelines.htm. Failure to employ these procedures, when possible, should be considered evidence of unnecessary suggestiveness.

6. In a lineup or photo array, appropriate non-suspect fillers must be chosen.[6]

This factor is universally acknowledged. It requires no further discussion here, other than to state that if police select fillers in a lineup or photo array who do not match the description of the perpetrator (as in the Avery case), or if the suspect stands out unduly, that suggestiveness spoils the fairness and reliability of the procedure. Again, because use of inappropriate fillers is ordinarily preventable, in most cases

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[6] Selection of fillers also applies only to lineups and photo arrays, not show-ups.

use of inappropriate fillers constitutes *unnecessary* suggestiveness that ought to lead to suppression of the ensuing identification.

CONCLUSION

For the reasons stated, this court should hold that eyewitness identifications will be suppressed if obtained through procedures that were unnecessarily suggestive. In making that assessment, courts should be guided by the growing and well-grounded body of social science research in this field, including the factors such as those set forth above in this brief and recognized by authoritative bodies elsewhere. Once *unnecessary* suggestiveness is found, courts should make no attempt to divine the reliability of such evidence. Show-ups, in particular, are inherently suggestive, and hence show-up identifications should be admissible only where the show-up was necessary—because police otherwise lacked probable cause that would permit an arrest and proper lineup or photo array, or other exigent circumstances required an immediate identification procedure—and when conducted in a manner designed to scrupulously avoid additional suggestiveness.

Dated this 10th day of February, 2005.

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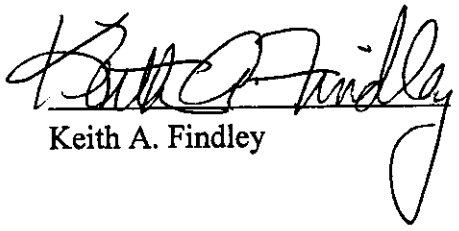
I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2996 words.



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